Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT AND MOTION FOR SUMMARY REVERSAL

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TABLE OF CONTENTS

	PAGE
Introduction	1
Opinion Below	2
Jurisdiction	2
The Statute Involved	2
Question Presented	3
Statement of the Case	3
The Questions Are Substantial	4
Motion for Summary Reversal	9
Appendix A—	
Opinion of United States District Court, Southern District of New York	A1
Appendix B—	
Order and Judgment of United States District Court, Southern District of New York	B1

Table of Authorities

Cases:

C.F.R. Enterprises, Ltd. v. Board of Education, 412 F.Supp. 1164 (E.D.N.Y. 1976)	8
Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, —— U.S. ——, 49 L.Ed.2d 65 (1976)	4

PAGE

Graham v. Richardson, 403 U.S. 365, 372 (1971) 5

In re Griffiths, 413 U.S. 717 (1973) 3, 4, 5, 6, 7, 8
Indiana Real Estate Commission v. Satoskan, (S.D. Ind. Dec. 28, 1973), *aff'd* 414 U.S. 938 (1974) 8

Mauclet v. Nyquist, 406 F.Supp. 1233 (E.D.N.Y. 1976), *prob. jur. noted* —— U.S. ——, 45 U.S.L.W. 3329 (Nov. 2, 1976) 8
McLaughlin v. Florida, 379 U.S. 184, 196 (1964) 5
Mendoza v. Miami, 483 F.2d 430 (5th Cir. 1973) 8

Norwick v. Nyquist, 417 F.Supp. 913, 921 (S.D.N.Y. 1976) 7, 8

Perkins v. Smith, 370 F.Supp. 134 (D.Md. 1974), *aff'd* —— U.S. ——, 49 L.Ed.2d 368 (1976) 8

Sugarman v. Dougall, 413 U.S. 634 (1973) 3, 4, 5, 6, 7, 8
Surmeli v. New York, 412 F.Supp. 394, 396-97 (S.D. N.Y. 1976) 5, 8

Taggart v. Mandel, 391 F.Supp. 733 (D.Md. 1975) 8
Truax v. Raich, 239 U.S. 33, 41 (1915) 5

Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) 5

Statutes:

New York Executive Law §215(3) 1, 2, 3, 4, 7

28 USC §1253 2

28 USC §1343(3) 2

28 USC §2201 2

PAGE

28 USC §2202 2

28 USC §2281 2

28 USC §2284 2

United States Constitution, Fourteenth Amendment 4, 5

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
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JURISDICTIONAL STATEMENT

Introduction

Appellant appeals from the judgment and order of a three-judge panel of the United States District Court, Southern District of New York, entered on September 1, 1976, one judge dissenting, upholding the constitutionality of New York Executive Law §215(3), which excludes resident aliens from appointment to the New York State Police. Appellant submits this statement to show that

the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The majority and dissenting opinions of the United States District Court are reported at 419 F.Supp. 889 (1976). A copy is attached as Appendix A.

Jurisdiction

Appellant's cause of action is based upon 42 USC §1983. Appellant sought an order declaring the New York Executive Law §215(3) prohibition of employing aliens with the New York State Police to be unconstitutional and enjoining its enforcement. The District Court had jurisdiction under 28 USC §1343(3). Declaratory relief is authorized by 28 USC §§2201 and 2202, and the three-judge court, convened under 28 USC §§2281 and 2284, is authorized to grant the injunctive relief sought by Appellant.

The judgment and order of the three-judge court was entered on September 1, 1976. A notice of appeal was filed on October 22, 1976. The jurisdiction of this Court to hear this appeal is conferred by 28 USC §1253.

The Statute Involved

The statute involved in this suit, New York Executive Law §215(3), provides in relevant part:

> No person shall be appointed to the New York state police force unless he shall be a citizen of the United States. . . . New York Executive Law §215(3) (McKinney Supp. 1975-76).

Question Presented

Does the blanket exclusion of resident aliens from employment with the New York State Police deprive these persons of the equal protection of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

Appellant Edmund Foley is a citizen of the Republic of Ireland and an alien lawfully admitted for permanent residence in the United States. The Appellant has been a resident of the United States and the state of New York since February, 1973.

The Appellant filed an application for employment with the New York State Police in August, 1975. Shortly thereafter he received a letter from the State Police saying that his application was being rejected because he was not a citizen of the United States. Thereupon, the Appellant, through his attorney, wrote to the New York State Police, expressing his view that the decisions of this Court in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), and *In re Griffiths*, 413 U.S. 717 (1973), prohibited New York State from discriminating against aliens in civil service employment, and suggesting that the New York State Police reverse their policy of discriminating against aliens. The State Police, relying on New York Executive Law §215(3), declined to do so, and this action was commenced.

On September 19, 1975, the Honorable Milton Pollack entered an order permitting the Appellant to take the competitive examination for State Trooper to be held September 20, 1975, and to otherwise pursue his application for that position as if he were a citizen, subject to the

proviso that no rights would attach to the plaintiff should the defendants ultimately prevail on the merits. The parties subsequently stipulated that the action proceed as a class action and that a three-judge court be convened. On December 30, 1975, Judge Pollack entered an order certifying the appellant as the representative of a class consisting of all permanent resident aliens who, but for the enforcement of New York Executive Law §215(3), would otherwise be eligible to compete for employment in the competitive class for State Trooper, and requiring the convening of a three-judge court. The case was argued on April 15, 1976, and decision upholding the constitutionality of §215(3) of the New York Executive Law was handed down in July, 1976, with the Honorable Walter R. Mansfield, United States Circuit Judge dissenting in a separate opinion. An order denying Appellant's motion for summary judgment was entered on September 1, 1976. The same order continued the stipulation under which the Appellant's application is being treated as if he were a citizen, pending a timely appeal to this Court. A copy of the judgment and order is attached as Appendix B.

The Questions Are Substantial

The basic issue presented by this case has been before this Court several times in the past few years. In each case, this Court decided that a state's exclusion of permanent resident aliens from a given class of employment solely on the grounds of their alienage was prohibited by the Fourteenth Amendment to the Constitution of the United States. *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, —— U.S. ——, 49 L.Ed.2d 65 (1976) (engineers); *In re Griffiths*, 413 U.S. 717 (1973) (attorneys); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973) (civil service employment).

From these and other cases dealing with the status and rights of aliens, certain "basic constitutional concepts" have emerged. *Surmeli* v. *New York*, 412 F.Supp. 394, 396-97 (S.D.N.Y. 1976). A lawfully admitted permanent resident alien is a person within the Fourteenth Amendment's prohibition against denial "to any person within its jurisdiction the equal protection of the laws." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. *Truax* v. *Raich*, 239 U.S. 33, 41 (1915). Classification based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny, *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971), and consequently a state which adopts a suspect classification bears a heavy burden of justification. *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964).

In order to meet this heavy burden, the "State must show that its purpose or interest is both constitutionally permissible and substantial and that [the use of the suspect classification] is necessary . . . to the accomplishment of its purpose or the safeguarding of its interest." *In re Griffiths, supra*, 413 U.S. at 721-22.

While acknowledging these to be the governing principles, the District Court chose not to apply them in the instant case. Although this Court's decisions in *Graham* v. *Richardson*, 403 U.S. 365 (1971) and *In re Griffiths, supra*, require that a statute discriminating against aliens as a class be subjected to strict judicial scrutiny, the District Court concluded that it need not apply so strict a standard of review in this case. App. at A24. To justify its conclusion the District Court relied upon certain language in *Sugarman* v. *Dougall, supra*, wherein it was sug-

gested that a less stringent standard of review would be appropriate when considering a state's power to set qualifications for "state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution or review of broad public policy perform functions that go to the heart of representative government." 413 U.S. at 647, 648. The District Court erroneously concluded that all the members of the New York State Police fall within this category. App. at A24. As Judge Mansfield points out in his dissent, this category is clearly a narrow one, encompassing only those people who "inevitably and properly act 'politically' by making basic policy choices which shape the future of the political community." App. at A49. The proper function of the State Police is neither political nor policy-making, but to enforce the law, which is set out in considerable detail for them. As the Superintendent of the State Police admits in his affidavit, the organization is para-military in nature, and follows a strict chain-of-command. Inasmuch as the tasks performed by the State Police do not rise to the policy-making level envisioned by this Court in *Sugarman,* New York's exclusion of aliens must be subjected to strict judicial scrutiny.

In order to justify its use of a suspect classification, the burden is on the state to prove

> that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interests. *In re Griffiths,* 413 U.S. at 721-22 (footnotes omitted)

An examination of the justifications offered by the state and accepted by the District Court makes it clear that this burden has not been met.

The majority finds the substantial and compelling state interest to be "the maintenance of public order to effect the preservation of the political structure including the prevention, detection and prosecution of crime." App. at A37-38. Even assuming this to be correct, it is difficult to see how this interest is furthered by the exclusion of aliens from the state police force. The assumption, highly speculative to say the least, that aliens cannot function effectively in such positions because of potential conflicts of loyalties was laid to rest in *Griffiths* and *Sugarman,* see *Norwick* v. *Nyquist,* 417 F.Supp. 913, 921 (S.D.N.Y. 1976), and, in any event, is hardly sufficient to meet the burden required of the state in this case. See Mansfield, J., dissenting, App. at A57-58. Of course, all policemen must and do carry out the law regardless of personal connections and identifications. Furthermore, the state's interest in the proper functioning of its police force and the proper enforcement of its laws can be ensured without resorting to the constitutionally impermissible exclusion of *all* aliens from the State Police. See *In re Griffiths, supra,* 413 U.S. at 725-27. The state may require a loyalty oath from the alien, *id.* at 727, and may further satisfy itself as to the qualifications and attitudes of alien applicants through the "individualized determination" suggested in *Sugarman, supra,* 413 U.S. at 647, and to which all applicants are already subjected. See New York Executive Law §215(3) (McKinney Supp. 1975-76).

In *Sugarman* v. *Dougall, supra,* this Court struck down a New York law which excluded all aliens from the competitive civil service. In *In re Griffiths, supra,* a Connecticut statute which excluded all aliens from the practice of law was similarly struck down. The duties of lawyers to foster and preserve this country's laws and Constitution are indisputable. We trust no one will, as no one can, urge

that the police are held to a higher duty or more intimately connected to our country's legal roots or structure than the legal profession. It follows *a fortiori* that the New York statute which excludes all aliens from the competitive position of State Trooper must likewise fall.

The decision of the District Court upholding this statute is clearly erroneous. Furthermore it represents a significant departure from the decisions of other courts in this county which have implemented the holdings of *Sugarman* and *Griffiths*. See, *e.g.*, *Mendoza* v. *Miami*, 483 F.2d 430 (5th Cir. 1973); *Norwick* v. *Nyquist*, *supra*; *C.F.R. Enterprises, Ltd.* v. *Board of Education*, 412 F.Supp. 1164 (E.D.N.Y. 1976); *Surmeli* v. *New York*, *supra*; *Mauclet* v. *Nyquist*, 406 F.Supp. 1233 (E.D.N.Y. 1976), *prob. jur. noted* —— U.S. ——, 45 U.S.L.W. 3329 (Nov. 2, 1976); *Taggart* v. *Mandel*, 391 F.Supp. 733 (D. Md. 1975); *Indiana Real Estate Commission* v. *Satoskan*, (S.D. Ind. Dec. 28, 1973), *aff'd* 414 U.S. 938 (1974); compare *Perkins* v. *Smith*, 370 F.Supp. 134 (D. Md. 1974), *aff'd* —— U.S. ——, 49 L.Ed. 2d 368 (1976). Consequently the questions presented by this case are substantial, and Appellants urge this Court to note probable jurisdiction and set the cause for oral argument, or, in the alternative, summarily reverse the decision of the District Court.

DATED: New York, New York
December 14, 1976

Respectfully submitted,

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MOTION FOR SUMMARY REVERSAL

IN THE

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OCTOBER TERM, 1976

No. .....

EDMUND FOLEY, *et al.*,

Plaintiffs-Appellants,

—against—

WILLIAM G. CONNELIE, *et al.*,

Defendants-Appellees.

Appellants, pursuant to Rule 35 of the Rules of the Supreme Court, move that the final judgment and decree of the District Court be reversed on the grounds that they are squarely in conflict with prior controlling decisions of this Court. The basis for this motion is more fully set out in the accompanying jurisdictional statement and in the dissenting opinion of Circuit Judge Mansfield set out in Appendix A.

The controlling principles in this case are well settled. The District Court's application of these principles is clearly erroneous. Thus the issue is not one of policy formulation, but one of policy implementation, and summary reversal is appropriate.

Respectfully submitted,

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Counsel for Appellants

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Plaintiff,

-against-

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and A.S. SMITH, individually and in his/her capacity as Director of Personnel of the New York State Police,

Defendants.

OPINION

75 CIV 4548 (MP)

APPEARANCES:

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BEFORE:

WALTER R. MANSFIELD, United States
Circuit Judge, Second Circuit
MILTON POLLACK, United States
District Judge
HENRY F. WERKER, United States
District Judge

HENRY F. WERKER, D.J.

Plaintiff Edmund Foley, a citizen of the Republic of Ireland, is living in the State of New York as an alien, lawfully admitted for permanent residence in the United States. Plaintiff applied for an appointment as a New York state trooper and was refused permission to take the competitive examination because he is not a United States citizen. Plaintiff brought this suit as a class action for a declaration that Section 215(3) of the Executive Law of the State of New York insofar as it excludes aliens from employment as New York state troopers is a violation of the equal protection clause of the fourteenth amendment of the Constitution of the United States and for an injunction against its enforcement. The purported class is identified as the plaintiff and all other alien residents of the State of New York who have applied or will apply

for the position of state trooper, and who have been or will be refused permission to take the competitive examination and who have been or will be denied consideration for the position on the grounds of alienage.

The defendants are William G. Connelie, individually and in his capacity as Superintendent of the New York State Police, and S.A. Smith, individually and in his capacity as Director of Personnel of the New York State Police.

The parties have entered into several stipulations. First they have agreed that the action should proceed as a class action and that Edmund Foley is the representative of that class. Second they agreed that a three-judge court should be convened. The parties also agreed that the plaintiff be permitted to take the competitive examination scheduled for September 20, 1975. On September 19, 1975 the Honorable Milton Pollack entered an

order which incorporated the parties' agreement as to the examination with the additional proviso that the test results not be implemented and no rights attach therefrom unless and until the court so directs. Judge Pollack also entered an order on December 30, 1975 authorizing the action to proceed as a class action with plaintiff as its representative and requiring the convening of a three-judge court. Upon the hearing of this matter on April 15, 1976, the parties agreed to submit the matter to the court on the record as it had been constituted on that date[1] for a final resolu-

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[1] The record consists of Plaintiff's Verified Complaint and Amended Complaint, with the exhibits attached thereto; Plaintiff's order to show cause and Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order; Edmund Foley's Affidavit; Plaintiff's Memorandum and Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment and the exhibits attached thereto; Defendant's Answer to the Amended Complaint; and William G. Connelie's Affidavit.

tion on the merits, and both parties waived their right to offer any additional evidence. For the reasons set out below we uphold the constitutionality of §215(3).

New York Executive Law §215(3) (McKinney 1972) reads in pertinent part:

> "No person shall be appointed to the New York State police force unless he shall be a citizen of the United States."

The statute clearly excludes aliens from employment as state troopers,[2)] and the State admittedly adheres strictly to its mandate. If an alien wishes to become a New York state trooper, he must give up his foreign citizenship and become an American citizen.

As early as 1886, the Supreme Court held that aliens are "persons" within the meaning of the Fourteenth Amendment and are thus protected by the Equal Protection

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2) See also New York Public Officers Law §3-6 (Supp. 1975).

Clause against discriminatory state action. Yick Wo v. Hopkins, 118 U.S. 356(1886). That holding has been affirmed many times since and is no longer open to dispute. In re Griffiths, 413 U.S. 717(1973); Sugarman v. Dougall, 413 U.S. 634(1973); Graham v. Richardson, 403 U.S. 365(1971); Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948).

The Supreme Court has on four recent occasions had an opportunity to examine employment prohibitions against aliens, and consideration of the statute under attack here must begin with a discussion of those four cases.

In Sugarman v. Dougall, 413 U.S. 634 (1973), the Supreme Court invalidated Section 53(1) of the New York Civil Service Law which made any person who was not a citizen of the United States ineligible for appointment to the competitive branch of the New York civil service. Relying on

Graham v. Richardson, 403 U.S. 365(1971), the Supreme Court classified aliens as a "discrete and insular minority" and thus held that classifications based on alienage are subject to strict scrutiny. The Court stated that there were narrow limits on a state's power to apply its laws exclusively to alien inhabitants. See Takahashi v. Fish & Game Commission, 334 U.S. 410(1948). The Court, in evaluating the statute, looked to the substantiality of the state's interest in enforcing it and to the narrowness of the limits within which the discrimination was confined. The Court was clear in defining alienage as a suspect classification and in requiring a compelling state interest to justify any discrimation based upon it. However, to apply this case properly to the case at bar, it is equally important to distinguish the factual circumstances that the Court confronted in Sugarman and those which are

before us today and to recognize the limits which the Supreme Court explicitly put on its Sugarman holding.

The statutory scheme within which Section 53(1) is included created a New York civil service of four classes.[3] The first was an exempt class of higher executive, municipal and judicial offices and positions for which an examination might be found impracticable.[4] The positions in this class include, among others, Counsel to the Governor, Director of the State Lottery, Executive Assistant to the Superintendent of Banks, and the Coordinator for Non-Public School Services.[5] The second was a non-

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[3] New York Civil Service Law §40 (McKinney 1973).

[4] Id. §41.

[5] For a complete listing of the many positions included in this class, see 4 NYCRR, Appendix 1(1975).

competitive class which included positions, not otherwise classified, for which a competitive examination would not be practicable but for which appointment was made by non-competitive examination.[6] Included in this class were positions such as chauffeurs, janitors, locksmiths, and the tree pruners in all state departments and agencies, as well as various specific positions in many departments.[7] The third class consisted of unskilled laborers whose positions could not be examined for competitively,[8] such as farmhands, kitchen helpers, parking lot attendants, and school monitors.[9] The cit-

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[6] New York Civil Service Law §42 (McKinney 1973).

[7] For a complete listing, see 4 NYC RR, Appendix 2(1975).

[8] New York Civil Service Law §43 (McKinney 1973).

[9] For a complete listing, see 4 NYC RR, Appendix 3(1975).

izenship requirements was inapplicable to all of the positions in each of these branches. The fourth branch, qualification to which was determined by the results of a competitive examination, was the only branch which excluded non-citizens. The members of this branch were employed in a wide variety of jobs including typists, file clerks, and sanitationmen.

In commenting on the statute, the court point d out that it was not "a legislative scheme that bars some or all aliens from closely defined and limited classes of public employment on a uniform and consistent basis." Sugarman v. Dougall, 413 U.S. at 639 (emphasis added). To the contrary, the Supreme Court found that the state's prohibition of the employment of aliens applied to many positions with respect to which the state's proferred jusitifaction had little, if any, relationship. At the same time, the Court went on, the prohib-

ition was not applicable at all to positions that would seem naturally to fall within the state's asserted purpose. We take this to mean, contrary to plaintiff's position, that the state, upon a proper showing of a compelling interest, could by means of a precisely drawn statute, exclude all aliens from certain employment.

The majority opinion stated explicitly:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within the 'basic conception of a political community.' Dunn v. Blumstein, 405 U.S. 330, 344(1972). We recognize, too, the State's broad power to define its political community." Sugarman v. Dougall, supra, at 642-43.

The Court's opinion contains two other significant statements which show the limit of its reach:

> "[W]e do not hold that, on the basis of an individualized determination, an alien may not be refused ... public employment, even on the basis of noncitizenship, if the refusal to hire ... rests on legitimate

> state interests that relate to qualifications for a particular position.... We hold only that a flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment."
> ...
> "Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office." Id. at 647.

The Court concluded its opinion by reiterating its position that "alienage itself is a factor that reasonably could be employed in defining 'political community.'"

In the second case, In re Griffiths, 413 U.S. 717(1973), the Supreme Court overturned a Connecticut statute which disqualified aliens from taking the state bar examination. The Court carefully examined the role of the lawyer and the nature of his profession in light of the heavy burden imposed on the state to justify depriving aliens of employment opportunities.

Connecticut sought to justify its position by establishing a link between the fact of citizenship and the powers and responsibilities attorneys carry as officers of the court.

In rejecting this as a basis for discriminating against aliens, the Court stated emphatically that lawyers "are not officials of government by virtue of being lawyers." 413 U.S. at 729. The Court relied heavily on Cammero v. United States, 350 U.S. 399 (1956), which distinguished between lawyers, as persons who engage in a private profession, and court officials such as "marshals, bailiffs, court clerks or judges ... [who serve] as officers within the conventional meaning of that term." 350 U.S. at 405.

The third case is Hampton v. Mow Sun Wong, U.S. , 44 U.S.L.W. 4737 (June 1, 1976), in which the Supreme Court invalidated a Civil Service regulation[10)]

[10)] 5 C.F.R. §338.101(1976).

which excluded aliens from employment in the federal civil service. Although this holding was based on the fifth amendment rather than on the fourteenth, it is consistent with Sugarman in that it proscribes a broad sweeping prohibition on the hiring of aliens. The prohibition reached every job in the federal civil service; no attempt had been made to identify those sensitive positions for which citizenship would be "an appropriate and legitimate requirement." Id. at 4745. In fact, the Court was careful to note that one of the original defendants to the action, the Postal Service, was no longer playing an active role in the appellate litigation because in response to "recent Federal litigation" it had promulgated a regulation that limited any exclusion of aliens to a high or "sensitive" level of the Service. Id. at 4739 and n. 13.

The regulation at issue in Hampton was adopted by the Civil Service Commis-

sion itself, not by the President or Congress. It is significant for our present purposes that the Court assumed, without deciding, that "Congress and the President have the constitutional power to impose the requirement that the Commission has adopted." 47 U.S.L.W. at 4744.

The Commission identified several governmental interests which the President or Congress might consider sufficient to justify the exclusion. It could enhance the President's position in negotiating treaties by enabling him to offer employment to citizens of a particular foreign country in exchange for certain desired concessions. It might also serve as an inducement to resident aliens to qualify for naturalization. The exclusion, which accords with international law and the policy of most foreign countries has been in effect since 1883. Finally, since it was appropriate to exclude aliens from

those sensitive positions which required undivided loyalty, the exclusion obviated the need to identify and classify those particular positions thereby reducing administrative effort and expense. As to all but the last of the interests, the Court held that they were not properly the Commission's business, and it rejected the argument that classifying civil service jobs according to their sensitive nature was such an onerous task that a concern for administrative convenience and efficiency justified the wholesale exclusion. However, it is important to note that the Court did assume "that the national interests identified by the [Commission] would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service." 44 U.S.L.W. at 4745.

The fourth and most recent case is Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, U.S.

, 44 U.S.L.W. 4890 (June 15, 1976) in which the Court invalidated a statute of Puerto Rico which permits only United States citizens to practice privately as civil engineers. Three jusitfications were offered to support the statute: to prevent the "uncontrolled" influx of Spanish-speaking aliens into the engineering field in Puerto Rico, to raise the prevailing low standard of living, and to provide the client of a civil engineer an assurance of financial accountability if a building for which the engineer is responsible collapses within ten years of construction. Id. at 4900.

In considering and rejecting the sufficiency of these reasons, the Court articulated the following standard:

> "[T]he governmental interest claimed to justify the discrimination is to be carefully examined to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." Id.

The Court followed the same mode of analysis as it had in Sugarman v. Dougall, supra, and in In re Griffiths, supra, as discussed above and cited those cases repeatedly. It is important to note, however, that the Court again expressly qualified its opinion as it had in Sugarman:

> "We do not suggest, however, that a State, territory, or local government, or certainly the Federal Government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens." Id.

It is within the context of these four cases that we must examine the statutory prohibition challenged here. The plaintiff argues that in analyzing the interest asserted by the state in its papers we must subject the use of alienage to close judicial scrutiny. Graham v. Richardson, 403 U.S. 365(1971).

In Graham the Supreme Court said at 372:

> [a]liens as a class are a prime example of a 'discrete and insular' minority (see United States v. Carolene Products Co., 304 U.S. 144, 152-153 n. 4(1938) for whom [a] heightened judicial solicitude is appropriate.

Consequently, the courts have applied the strict scrutiny or compelling state interest test to cases involving the "discrete and insular minority" of aliens.

However, the Supreme Court in Sugarman v. Dougall, 413 U.S. 634, 646, et seq. (1973), articulated an exception to the otherwise broad application of the strict scrutiny test to statutes dealing with this alien minority. It indicated that Courts should not interfere with the states' "historic power to exclude aliens from participating in [those] democratic institutions" which the Courts and people ordinarily rely on to protect minority and individual rights. In striking the

statute before it, the Court declared that it should not usurp the states' "responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders."

Writing for the majority, Justice Blackmun stated that the Court's "scrutiny will not be so demanding" where it faced with the exercise of the "State's constitutional prerogatives," including the state's power to set the qualifications for persons holding "important non-elective executive, legislative, and judicial positions." Sugarman, supra at 647, 648; Dunn v. Blumstein, 405 U.S. 330, 344(1972). Thus, it is clear that aliens as a class are unlike other "discrete and insular minorities." The Supreme Court has recognized that the strict scrutiny test cannot be applied unthinkingly to rights and privileges that involve an alien's participation in demo-

cratic processes without a corresponding erosion of the notion of citizenship. The classification of alienage, suspect for some purposes, may be permissible when the state is dealing with democratic government and its participants.

Although the courts must be vigilant in protecting certain minority interests where political processes do not provide sufficient protection, the political processes themselves may not be opened to alien participation by such judicial vigilance. A state can reasonably curtail the alien's participation in state government, but it cannot curtail the rights and privileges that ordinarily result from such participation, absent a compelling interest.

The position of state trooper necessarily entails participation in state government to such a degree as to overshadow the fact that eligibility for that position is a governmental benefit normally avail-

able to members of the political community. The state trooper's job is not included in the class of "common occupations of the community" to which the shelter of the equal protection clause has been held to extend for the benefit of aliens. Sugarman v. Dougall, 413 U.S. 634, 641. This is not a case like Truax v. Raich, 239 U.S. 33 (1915) in which a state denied aliens lawfully residing within the state the ordinary means of earning a living. The Court held there that "[t]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure." 239 U.S. at 41. We believe that the state has a special interest in the composition of its police force which justifies exempting it from the class of ordinary occupations from which aliens cannot be excluded.

Positions such as these are designed

specifically for the direct preservation and protection of the constitutional rights of all persons within New York State. These are delicate nonelective executive positions made more so by the fact that the performance of the members is largely unsupervised. It is our conclusion that this is an "important nonelective executive ... position" and these "officers who participate directly in the ... execution ... of broad public policy perform functions that go to the heart of representative government." Sugarman v. Dougall, 413 U.S. 634, 647. This is a situation where citizenship bears a vital and essential relationship to the proper performance of the duties of a state trooper.

Accordingly, the Court need not subject the statute under review to quite the close scrutiny applied to statutes in Graham, Sugarman and Griffiths. However, even applying the stricter test, the Court finds that the statute does not clash with

the requirements of the Constitution.

Where a state asserts a compelling state interest to justify statutory discrimination based on a suspect classification, it must establish a very substantial state interest; it cannot choose a means to pursue that interest which unnecessarily burdens or restricts constitutionally protected activity; the statute must be drawn with precision and be tailored to meet legitimate objectives; finally, if there is a less restrictive alternative available that will adequately accomplish its purposes, the state must employ it. Dunn v. Blumstein, 405 U.S. 330(1972).

The statutory framework of which Section 215(3) is a part is relatively simple and does not contain the arbitrariness and inconsistency which characterized the Civil Service Law of New York.

Section 31 of the New York Executive Law (McKinney 1972) provides that the state

police shall be a division of the executive department. Article 11 of the Executive Law is entitled Division of State Police. It includes sections which detail the organization, powers, duties and benefits of the State Police. Section 223 provides:

> "It shall be the duty of the superintendent of the state police and of members of the state police to prevent and detect crime and apprehend criminals. They shall also be subject to the call of the governor and are empowered to cooperate with any other department of the state or with local authorities. They shall have power to arrest, without a warrant, any person committing or attempting to commit within their presence or view a breach of the peace or other violation of law, to serve and execute warrants of arrest or search issued by proper authority and to exercise all other powers of peace officers of the State of New York. Any such warrants issued by any magistrate of the state may be executed by them in any part of the state according to the tenor thereof without indorsement. But they shall not exercise their powers within the limits of any city to suppress rioting and disorder except by direc-
> of the governor or upon the

> request of the mayor of the city with the approval of the governor. Any member of the rank of sergeant or above may take pre-arraignment bail from any defendant in the amounts and under the circumstances and conditions that police may take bail."

Furthermore the state police are responsible for enforcement of all powers and duties imposed on inspectors and game protectors under the conservation law[11] and for performing the duties with respect to found property and instruments imposed by the personal property law.[12] The definition of "state officer" provided in §2 of the New York Public Officers Law (McKinney 1952) seems to include the state police and it has been so interpreted by the State Attorney General. Op. Atty. Gen., 13 St. Dept. 430(1917). That opinion differen-

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11) New York Executive Law §225 (McKinney 1972).

12) Id. §226.

tiated between the members and officers of the state police on one hand and their clerks and stenographers on the other.

The state police force is the only New York police force with statewide jurisdiction. State police are authorized to effect arrests with and without warrants. The state police protect the governor and visiting foreign dignitaries. State troopers must carry weapons when on duty and are authorized to do so while off duty. State police members are on call twenty-four hours a day and must take appropriate action at any time they observe criminal conduct. We believe that the state has adequately demonstrated that these officers bear awesome responsibilities.

State police are charged with the enforcement of the law, not in a private profession and for the benefit of themselves and their clients, but for the benefit of the people at large of the State of New

York. Their powers are statewide except to the extent that the direction or approval of the governor is required before they can act to suppress rioting or disorder within the limits of any city.

A state police officer has a highly sensitive and delicate role. To properly perform his function he must be "personally committed to the proper application and enforcement of the laws of the United States." United States v. Gordon-Nikkar, 518 F.2d 972(5th Cir. 1975). This court believes there is a strong similarity between the role played by the juror and the policeman in our society, and it has been often recognized that states and the federal government have a compelling interest which justifies excluding aliens from jury service. United States v. Gordon-Nikkar, supra; Perkins v. Smith, 370 F.Supp. 134 (D. Md. 1974) (three-judge court), aff'd, U.S. , 44 U.S.L.W. 3698 (June 8, 1976). See Carter

v. Jury Commission, 396 U.S. 320(1970).

We feel it is significant, thought [sic] not dispositive, that at least twenty-nine other states[13] and numerous foreign coun-

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[13] A verification of the information supplied to the court by the defendants and the FBI yielded the following statutes: Alaska Stat. §39.05.010(1962); Ariz. Rev. Stat. Ann. §38-201(1974); Ark. Stat. Ann. §42-406(1964); Fla. Stat. Ann. §94313(2) (Supp.1976); Ga. Code Ann. §92A-214(1972); Hawaii Rev. Stat. §78-1(1968); Ill. Rev. Stat. ch. 121, §307.9(1965); Ind. Admin. Rules and Regs. (47-848)-1(1967); Iowa Code Ann. §8Q15(1949); Kan. Stat. Ann. §74-2113(c) (Supp. 1975); Ky. Rev. Stat. §16.040(2)(c) (Supp. 1974); Mass. Gen. Laws Ann. ch. 31, §12(Supp. 1975); Mich. Stat. Ann. §28.4(1967); Miss. Code Ann. §45-3-9(1972); Mo. Rev. Stat. §43.060(1969); Mont. Rev. Codes Ann. §31-105(3)(a)(v)(Supp. 1975); Nev. Rev. Stat. §281.060(1)(1975); N.H. Rev. Stat. Ann. §106-B:20(Supp. 1975); N.J. Rev. Stat. §53:1-9(Supp. 1975); N.M. Stat. Ann. §39-2-6(1972); N.D. Cent. Code §39-03-04(4)(Supp. 1975); Ohio Rev. Code §124.22(1974); Okla. Stat. Ann. tit. 47, §2-105(a)(Supp. 1975); Ore. Rev. Stat. §181.260(1)(a)(1971); Pa. Stat. Ann. tit. 71, §1193(1962); R.I. Gen. Laws Ann. §42-28-10(1970); S.D. Compiled Laws Ann. §3-7-9(1974); Tex. Rev. Civ. Stat. Ann. art. 4413(9)(2)(1966); Utah Code Ann. §27-11-11(1969). In addition, other states may have enacted a citizenship requirement by rule or regulation; the defendants have informed the court that at least Maine, Maryland and Nebraska have each done so.

tries[14] have enacted a citizenship requirement for members of the state or national police force. As Justice Jackson once said, "The mere fact that a path is a beaten one is a persuasive reason for following it."[15] While frequent use cannot validate a practice otherwise violative of the equal protection clause, we believe the prevalence of this requirement is probative of the existence of a legitimate and profound state in interest: i.e., the concern about the

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14) See, e.g., Aliens Restriction Act, 9 & 10 Geo. 5, c. 92, §6(1919), as amended Aliens Employment Act, 4 Eliz. 2, c.18 (1955); Ordonance No. 59-244, Art. 16(1959) (France); Bundeskeamtengesitz, §7(1)(1953) (Germany); Statuto degli Impiegati Civili delto Stato, Art.2:(1)(Italy); Grondwet voor het Koninkrijk der Nederlanden, Art. 5(2)(Netherlands); Bundesgesetz uker das Dienstverhaltnis der Bundesbeamten, Art.2 (1927)(Switzerland). See generally Public Administration Branch, Department of Economic and Social Affairs, United Nations, Handbook of Civil Service Laws and Practices.(1966).

15) Jackson, Full Faith and Credit -- The Lawyer's Clause of the Constitution, 45 Col. L. Rev. 1, 26(1945).

ability of an alien to execute properly the functions of a state police officer. This is a concern which cannot be easily disregarded.

One further factor compels the court to adopt this conclusion. The state police force is responsible for detecting and preventing not only common crime but also subversion, incitement to riot and the quelling of public disorders. The equal protection clause most certainly does not deny to each state a right to limit its police force to those persons whom it believes will be most interested in its self-preservation. A state cannot afford the risk of employing as a state trooper a person whose inclination to apply justly the laws of the state and federal government and whose spirit and enthusiasm for the customs and traditions of American life the state doubts. His possible allegiance to a foreign sovereign is more than adequate to give rise to doubt

until such time as an alien makes the important step of becoming a naturalized citizen. The state may harbor serious concern as to that individual's commitment to the United States and the enforcement of its statutes and Constitution. The state thus has a compelling interest which justifies its decision to exclude aliens.

The dissent asserts that the State has made no showing that an alien would be less likely than a citizen to live up to the state policeman's oath to equitably enforce the laws against both aliens and citizens. Actually, the state has enumerated several characteristics which distinguish alien status from citizen status. These factors must necessarily create divided loyalties and thus diminish the alien's ability to faithfully fulfill a policeman's responsibilities.

Until an alien is admitted to citizenship, he enjoys special privileges and

bears certain burdens not shared by citizens. These privileges and burdens betoken his continuing allegiance to the country of his nationality. The resident alien "retains a claim upon the state of his citizenship to diplomatic intervention on his behalf." Harisiades v. Shaughnessy, 342 U.S. 580, 585(1952). See also C. Harper, Immigration Laws of the United States, Part VII, §1(a) at 567 (3d ed. 1975). He is subject to that country's powers of conscription and taxation, E. Borchard, Diplomatic Protection of Citizens Abroad, §13 at 22-23(1927). He may not be obliged to fight against that country, Art. 23, 1907 Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2301-2302, or in any military confrontation concerning which that country is neutral, 4 J. Moore, International Law Digest, §3648, at 52-53(1906). Aliens are eligible for the United States draft only if they have immigrant status, 32 C.F.R.

§1611.2(a), and an immigrant may obtain an exemption pursuant to treaty, cf. 8 U.S.C. §1101, or change his status to non-immigrant, 8 U.S.C. §1257(a).

The federal government has the power to deport a resident alien, e.g., 8 U.S.C. §1251, Carlson v. Landon, 342 U.S. 524(1951); to expel him in the event of hostilities with the country of his nationality, Borchard, supra, §46, at 109; to take less drastic measures such as detention, concentration or prohibition of residence in certain defined areas, Borchard, §46, at 113; and to deny him re-entry if he leaves the country, e.g., 8 U.S.C. §1182(a)(20).

The limbo of loyalty that results from these rules continues for a period of at least five years, 8 U.S.C. §1427, and it is not for this Court to question the support for such a time period. See Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Harisiades, supra; Lem Moon Sing

v. United States, 158 U.S. 538, 547(1895). The resident alien's status is one that cannot but reflect on and affect his ability to uphold the laws of this country, allegiance to which is insured only after naturalization and the consequent removal of the above-enumerated ties to a foreign state. The state quite rightly observes that conflicts of allegiance would be most glaring with respect to the alien's duty as a state policeman to make arrests of violators of the federal immigration laws, to participate in the Governor's Detail which provides protection for the Governor and visiting foreign dignitaries, to conduct investigations into matters having to do with government security, and to provide security at events involving foreign visitors such as the 1980 Winter Olympics to be held in Lake Placid, New York.

The dissent describes such potential conflicts as theoretical, offering as an alternative "theory" the suggestion that

an alien would be "especially careful" to enforce the laws against fellow aliens in order to avoid the appearance of partiality and to curtail the activities of anyone who would cast disgrace on aliens as a group. The notion that an alien state policeman would be tougher on fellow aliens suggests the very type of partiality that state police ought carefully to avoid, and the argument that an alien would be concerned about the group image of aliens in general is indeed theoretical, if not implausible. This alternative "theory" and the dissent's final suggestion that aliens would enforce the laws just as citizen state policemen do are far outweighed by the compelling arguments of the state in favor of restricting to citizens the sensitive job of protecting and, when required, arresting aliens and citizens alike.

We find that the state has a substantial and compelling interest in requiring

the members of the state police force to be citizens and that interest is the maintenance of public order to effect the preservation of the political structure including the prevention, detection and prosecution of crime.[16)]

The finding of a compelling state interest, however, does not conclude the inquiry where a suspect classification is at issue. The state must not choose a means which unnecessarily burdens constitutionally protected activity. As Judge Winter pointed out in his concurring opinion in Perkins v. Smith, supra, the group of aliens whose continued and natural commitment to a foreign sovereign would not interfere with an enthusiastic and unconditional enforcement of our laws and public policy is impossible to identify. Only by taking a positive step to renounce his prior allegiance does the alien affirmatively demonstrate the focus of his loyalty, and the Constitution

16)

The dissent erroneously decries the absence of evidence to support the majority opinion. There is ample evidence. Moreover, the dissent's criteria, if accepted, would eliminate the confirmed citizenship requirements for jurors, assemblymen, city and state officials, F.B.I. agents, congressmen, senators and even the President. The dissent argues, we believe erroneously and theoretically: "A properly tested, selected and trained resident alien would [not] be less competent to perform the duties ... would [not] present a poorer security risk or be less loyal to the State than citizens in the performance of these duties." (dis. op. sic.) This theory would compel New York State's police to be manned by aliens. The compulsion to admit one requires admission of all. We believe that the citizenship requirement is even more apt under these circumstances.

has vested in Congress the exclusive authority to naturalize citizens. United States Constitution, Art. I, §8, Cl. 4. Thus this Court believes there is no less drastic alternative available. Finally, the court finds that the statutory scheme which excludes all aliens from all positions within the state police force is as precisely drawn as the state interest requires.

Dunn v. Blumstein, 405 U.S. 330(1972), recognized that the state has the power to establish a bona fide residency requirement to preserve its basic conception of the political community. We hold that the power also enables a state constitutionally to establish a citizenship requirement where that requirement is intimately related to a compelling state interest. Each state has a broad power to define its political community and may limit participation in its government to those who are within that community. Sugarman v. Dougall, 413

U.S. 634, 642-43. We thus uphold the constitutionality of Section 215(3) of the New York Executive Law and grant summary judgment to the defendants.

Submit Order

DATED: New York, New York
July 8, 1976

MILTON POLLACK, D.J.

HENRY F. WERKER, D.J.

MANSFIELD, Circuit Judge (Dissenting)

There is not a shred of evidence in the record of this case to indicate, much less prove, that a properly tested, selected and trained resident alien would be less competent than a citizen to perform the duties of a New York state trooper, which admittedly are paramilitary in nature, or that members of the plaintiff class would present a poorer security risk or be less loyal to the State than citizens in the performance of those duties. On the contrary, this country has in practice considered resident aliens not only to be qualified but obligated to perform analogous duties in our armed services. The State of New York has failed completely to sustain its heavy burden under the Equal Protection Clause of demonstrating that the exclusion of noncitizens from service as state policemen is necessary to protect some substantial state interest. Accordingly, I must

respectfully dissent.

It is as close to hornbook law as constitutional law can ever be that resident aliens are no longer a group bereft of the protection of the Equal Protection Clause or other provisions of the Constitution. On the contrary, because of their vulnerability to discrimination based on their minority status and their inability to protect their interests through the political process, resident aliens are entitled under the Equal Protection Clause to a careful judicial examination of any efforts to deny them their rights. "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.... Accordingly, ... 'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'" Graham v. Richardson, 403 U.S. 365, 372 (1971), quoting Takahashi v. Fish and Game

Commission, 334 U.S. 410, 420(1948) (footnotes omitted). The strict judicial scrutiny under which the Equal Protection Clause places such classifications demands, of course, that the classification be supported by a substantial state interest and be no broader than necessary to protect that interest.

> "The Court has consistently emphasized that a State which adopts a suspect classification 'bears a heavy burden of justification,' McLaughlin v. Florida, 379 U.S. 184, 196 (1964), a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary ... to the accomplishment' of its purpose or the safeguarding of its interest." In re Griffiths, 413 U.S. 717, 721-22(1973) (footnotes omitted).

The fact that the Constitution demands solicitous protection of the rights of resident aliens is once again illustrated by

the very recent decision in Hampton v. Mow Sun Wong, 44 U.S.L.W. 4737 (U.S., June 1, 1976), where the Supreme Court upheld a challenge, brought under the Fifth Amendment's Due Process Clause, to a U.S. Civil Service Commission rule barring aliens from most federal civil service positions. While the Court acknowledged the "paramount federal power over immigration and naturalization," id. at 4740, and therefore applied a less stringent standard of review to this federal rule than it would to state rules affecting aliens challenged under the Equal Protection Clause, it nonetheless found the government interests advanced in support of the rule insufficient to justify its "impact on an identifiable class of persons who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community," id. at 4741, and accordingly held the rule deprived aliens of liberty without due

process of law.

This heightened protection of resident aliens' interests reflects the realization that they should not be treated as distasteful intruders upon our society but rather as welcome participants in it, even though they lack the full political rights reserved for citizens. "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that the State bear a heavy burden when it deprives them of employment opportunities." Id. at 722. To this might be added that they are, like citizens, obligated to obey the laws of this land. The fact that an individual bears the status of resident alien does not, therefore, imply that he rejects the laws and values of the United States; indeed, even those aliens who most fervently support those laws and desire to become citizens must, with rela-

tively few exceptions, remain in the status of resident alien for five years before becoming eligible for naturalization. 8 U.S. C. §1427(a). Thus they are often unable, simply by the stroke of a pen and the taking of an oath, to "give up" their status immediately or change it to that of American citizen. The record in this case gives no indication that the named plaintiff is not in precisely this situation.[1)]

The majority opinion gives lip service to these established principles but then seeks to circumvent their application to the present case by reasoning that the citizenship requirement for the position of state policeman is exempt from the de-

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[1)] Counsel for the plaintiff advises that the plaintiff is, in fact, presently ineligible for naturalization because he has not yet met the five-year residency requirement, and that he will be too old to apply for the State Police after he has been naturalized. (Reply Brief, p.10.)

manding standard of review applied to other classifications based on alienage. The basis for this approach is said to be certain language in Sugarman v. Dougall, 413 U.S. 634(1973), where, in the course of ruling that the ban of aliens from civil service employment contained in N.Y. Civil Service Law §53(1) violated the Equal Protection Clause, Justice Blackmun, writing for eight members of the Supreme Court, stated that the Court would not review so severely a citizenship requirement of

> "persons holding state elective or important nonelective executive, legislative, or judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." Id. at 647.

When such positions were involved, Justice Blackmun continued, the State would only be required to make the lesser showing that "citizenship bears some rational relation-

ship to the special demands of the particular position," id., quoting Dougall v. Sugarman, 339 F.Supp. 906, 911(S.D.N.Y. 1971) (Lumbard, J., concurring).

When this language quoted from Sugarman is viewed in the light of the Court's reasoning behind it, the class of executive officers to which it would apply is clearly a narrow one. The Court's suggestion that the State might prescribe citizenship for some offices without a showing of special need was expressly based upon the State's obligation "to preserve the basic conception of a political community." Dunn v. Blumstein, 405 U.S. 330, 344(1972). Voting and legislating are paradigmatic examples of participation in a political community; to require that aliens, by definition persons not members of that political community, be allowed to exercise these functions would be to erode beyond recognition the concept of a political system and of cit-

izenship. Similarly, some high executive officials, such as governors, cabinet members, and heads of agencies, necessarily possess such broad delegated powers that they inevitably and properly act "politically" by making basic policy choices which shape the future of the political community, in this instance the State of New York. Though such top policy-making officials are, of course, ultimately under the control of the voters and legislators, as a practical matter such officials are properly acting as leaders of the political community and and thus may reasonably be required to be members of it. These are the persons to whom the Sugarman opinion referred as those who might reasonably be required to be citizens. See also In re Griffiths, supra, 413 U.S. at 729 ("one so close to the core of the political process as to make him a formulator of government policy").

Important as are state policemen --

and for that matter other policemen -- to the security and well being of the State, their proper function is neither political nor policy-making. Their task is not to elect or legislate but to enforce the law. The governmental policy implemented by them is set out, in considerable detail, in the criminal laws of New York, which it is their duty to enforce. In carrying out that clearly-defined policy the state policeman performs duties which for the most part are essentially ministerial in nature, e.g., the patrolling of highways and guarding of other areas to prevent crime and detect violators; the protection of state officials and buildings; the control of vehicular traffic on state highways; the furnishing of emergency first aid; searches for missing persons; the investigation of crimes, suspected or committed, in response to complaints or for other reasons; the making of arrests and execution of warrants;

the interrogation of suspects, arraignment of defendants, and the collection and furnishing of evidence, including expert testimony.

In the performance of these and other similar duties policemen, of course, are not automatons. They do exercise some discretion in law enforcement which may, in particular situations, be said to rise to the level of limited, interstitial policy-making, see generally K. Davis, Police Discretion (1975). However, their activities can hardly be regarded as a political function going "to the heart of representative government." Sugarman v. Dougall, supra, 413 U.S. at 647. New York State itself recognizes that the individual state policeman is not properly a law or policy-maker comparable to a legislator or high executive official; he is not given free rein, but rather is controlled by a chain of command and organization which the

State itself describes as "para-military." (Connelie affidavit, ¶4). See also 9A N.Y. C.R.R. §478.7 (regulation emphasizing importance of discipline in state police force.

In short, whatever the range of offices ultimately held to be embraced within those so intimately connected with the State's political processes that the State may, without showing a compelling need, simply mandate that they be filled by citizens only, the position of state policeman, being one which involves the application of settled state law rather than the formulation of new law or policy, is not one of them. Since Sugarman v. Dougall, supra, thus provides no basis for lessening the stringent standard to be applied upon judicial review of the statutory disqualification of noncitizens from the State police force, the State must bear the heavy burden of showing that the disqualification is necessary to safeguard a substantial

or compelling state interest. See In re Griffiths, supra, 413 U.S. at 721-22; Graham v. Richardson, supra, 403 U.S. at 375. No such showing has been made in this case.

The issue boils down to whether the disqualification of aliens from the force is in any sense necessary to assure that the New York State Police will faithfully perform their duties. The State attempts to provide the necessary link by suggesting that the alien's presumed loyalty toward his country of nationality and his possible partiality toward his fellow aliens may create a conflict of interest in a variety of situations as, for example, when a noncitizen state policeman is called upon to assist federal authorities in enforcing immigration laws, to defend the State against insurrection, or to provide protection for foreign dignitaries at the 1980 Winter Olympics at Lake

Placid.[2)]

The State's assumption that a noncitizen state policeman might show partiality toward his fellow aliens may be arguable as a matter of sociological and psychological speculation, but it is no more plausible in theory than the opposite assumption: that the noncitizen state policeman would be especially careful to enforce the laws against fellow aliens, not only to avoid any appearance of partiality but also to prevent the alien lawbreaker from bringing disgrace upon all aliens, including the policeman. Or,

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2) It can easily be doubted how often even these potential conflicts are likely to arise. Though the State, for instance, stressed at oral argument the difficulties which might arise if a noncitizen state policeman were required to arrest illegal aliens, the affidavit by Superintendent Connelie states that the more than 3,000 members of the force made only 200 such arrests in 1974. Other potential conflicts seen by the State -- for instance, those perceived from having noncitizen troopers provide security at the Winter Olympics -- are clearly avoidable through avoiding assignment of noncitizen troopers to such duties.

it might simply be assumed that noncitizen and citizen policemen will not differ in their attitudes and diligence in enforcing the laws against all persons, much as black and white police officers do not appear to differ appreciably in their attitudes toward police problems, including racially-related ones. See J. Wilson, Thinking About Crime 106(1975). In the present case, all of these theories remain precisely that: just theories. Even if we assume them to be plausible as a matter of general speculation, none is supported by any empirical evidence in the record.

Were the classification created by the state legislature in its enactment of §215(3) of the Executive Law not to be viewed as a "suspect" one according to clear Supreme Court decisions, e.g., Sugarman v. Dougall, supra; In re Griffiths, supra; Graham v. Richardson, supra, the legislature might escape the stricter standard of

review necessitating judicial intervention and rely upon one of these theories as a ground for upholding its action according to the looser rational basis criterion. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 488-89(1955); Railway Express Agency Inc. v. New York, 336 U.S. 106, 109-10(1949). See generally Developments in the Law--Equal Protection, 82 Harv. L. Rev. 1065, 1082-87(1969). However, since the State has here acted to exclude a minority accorded special protection by the Equal Protection Clause, the State must assume the heavy burden of coming forward with evidence that its assumption is not merely plausible but rests on a foundation of fact rather than of speculation. The State has not even attempted to make such a showing to support its idea that a resident alien would be less likely than a citizen to live up to his oath as a policeman to enforce the law against all persons, alien

or otherwise.

The State's failure to make the required showing is not remedied by the majority opinion's citation of a hodge-podge of statutes and other materials concerning various aspects of the legal status of aliens. Far from showing as the majority argues, that a permanent resident alien suffers from a "limbo of loyalty," these materials, insofar as they are relevant at all to the present case, point toward the conclusion that permanent resident aliens are, as a group, as law-abiding and loyal as citizens and could be safely employed as state troopers. The majority notes, for instance, that aliens are subject to deportation. However, deportations of permanent resident aliens -- the plaintiff class in this case -- are exceedingly rare, so rare that it is impossible to say that a permanent resident alien's potential deportability poses any obstacle to his em-

ployment. In 1975, some 4.2 million aliens were permanent residents of the United States. 1975 Annual Report of the Immigration and Naturalization Service 112. During the year, only 1,716 aliens who had entered the country with such an "immigrant" status were deported or required to leave the country. Id. at 98. See also Sugarman v. Dougall, supra, 413 U.S. at 645.

The majority's reference to the Selective Service laws -- seemingly to suggest a Congressional judgment that permanent resident aliens may pose security problems -- is also misguided. The provision cited, 31 C.F.R. §1611.2(a), excludes from the draft only aliens temporarily present in the United States: diplomats, students, business or pleasure travelers, and the like. See id.; 8 U.S.C. §1101(a)(15). The permanent resident aliens who are the plaintiff class in this case are subject to the draft to the same extent as citizens, see

50 U.S.C. App. §453; 31 C.F.R. §1611.1(a)(2), (3),(4); Sugarman v. Dougall, supra, 413 U.S. at 645, which suggests that Congress does not perceive the same security risks from the aliens involved here that is suggested by the majority. The status of enemy aliens in wartime mentioned by the majority is simply irrelevant to this case. If hostile relations existed between the United States and a particular alien's country of nationality, this could be taken into account as part of the "individualized determination" of the alien's eligibility for employment permitted by Sugarman v. Dougall, supra, 413 U.S. at 646-47. See In re Griffiths, supra, 413 U.S. at 722 n.11. But the statute presently under review does not limit the disability of permanent resident aliens to those unusual situations where a conflict of loyalties might conceivably exist. Rather, it bars all resident aliens from the state police, including those

who have immigrated to the United States from countries which have long enjoyed the most cordial relations with this nation. We may, for instance, take judicial notice that the possibility of a war between the United States and Ireland (the homeland of the named plaintiff) is exceedingly slim.

Finally, by noting that aliens may "claim the diplomatic protection" of their country of nationality, the majority seemingly seeks to imply that they would somehow be immune from dismissal for improper performance of their duties as policemen. Nothing, of course, could be further from the truth. The "diplomatic protection" involved is merely a foreign consulate's inquiry into a situation involving one of its nationals, not the immunity from prosecution reserved for accredited diplomats. Aliens, other than accredited diplomats, are regularly prosecuted if they break the laws, and would similarly be subject to

dismissal from their police posts on proper grounds.

No doubt there are some resident aliens whose backgrounds might reasonably create doubt as to their dedication to the laws of the State, just as there are citizens whose backgrounds would provide similar suspicions. Under authority provided by the state legislature, see N.Y. Exec. Law §215 (3), Superintendent Connelie of the State Police already employs selection procedures to weed out citizen applicants who appear unsuitable for police work. These same selection and training procedures, applied equally to all applicants, would provide the State with the means of assuring that only those aliens whose loyalty and suitability for police work were not questionable would become members of the State Police force.[3)]

[3)] The fact that the applicant for the State Police must undergo background checks and rigorous selection procedures distinguishes this case from United States v.

Such a case-by-case determination of the qualifications of particular applicants, as opposed to the flat ban on noncitizens now employed by the State, was implicitly approved by the Supreme Court in Sugarman v. Dougall, supra, 413 U.S. at 646-47:

Gordon-Nikkar, 518 F.2d 972(5th Cir. 1975), and Perkins v. Smith, 370 F.Supp. 134(D.Md. 1974), appeal docketed, 43 U.S.L.W. 3001 (U.S., July 2, 1974), where the courts upheld citizenship requirements for jurors. Given the fact the jurors must, of necessity, be selected through rather expedited procedures, the only method the State has of safeguarding its interest in having jurors with demonstrated knowledge of and dedication to the laws they are to apply is by relying on the naturalization procedures. There is no reason to believe, however, that the State Police selection procedures would be less effective than the naturalization procedures in determining if a given noncitizen applicant understands and is likely to support faithfully the laws of the nation and the State, insofar as this can ever be determined through such procedures.

> "[W]e do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee." (Emphasis added)

Once on the State Police force, a noncitizen trooper would, of course, be subject to the same chain of command and disciplinary sanctions as his citizen counterparts to assure that he faithfully performed his duties. The fact that requirements of citizenship for policemen, while not uncommon, are hardly universal among the states underlines the conclusion that such individual evaluations of noncitizen applicants and the normal discipline of State Police are likely to fully protect the State's interest in having a loyal and diligent State

Police force.[4)]

/s/
Walter R. Mansfield, U.S.C.J.

Dated: July 6, 1976
New York, N.Y.

[4)] Besides New York 23 states have statutory requirements of citizenship for members of the State Police. See, e.g., Ariz. Rev. Stat. Ann. §38-201; Mich. Stat. Ann. §4.434; R.I. Gen. Laws §42-28-28(1956). Twenty-six states, e.g., California, Maryland, and Wisconsin, have no apparent statutory citizenship requirement, although some of these states may have established such a requirement through rule or regulation. A spot survey conducted by the Federal Bureau of Investigation at the request of this court indicated that citizenship was required by the majority of the police agencies surveyed, although not by the California State Highway Patrol, and the police departments of Boston, Mass. and New Haven, Conn. At the least, this data indicates that the importance of citizenship requirements for policemen is subject to different appraisals in various states and localities. Given the heavy burden of proof resting on New York in this case, the fact that a number of police agencies forego such citizenship requirements without apparent injury to their interests casts considerable doubt on the necessity for, and thus the constitutionality of, the requirement.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDMUND FOLEY,

Plaintiff,

-against-

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Defendants.

ORDER AND JUDGMENT

Index No. 75 CIV 4548

IT IS ORDERED that the plaintiff's motion for summary judgment is denied and the defendants' motion for summary judgment is granted.

Pursuant to Rule 62 of the Federal Rules of Civil Procedure, it is further

ORDERED that the temporary restraining order signed on September 19, 1975 and stipulated and so ordered on December 22, 1975, restraining defendants, WILLIAM G.

G. CONNELIE and S.A. SMITH from:

(a) Refusing to accept plaintiff's application for employment solely on the grounds of his alienage; and,

(b) Refusing to assess plaintiff's application for employment as if he were a citizen of the United States, is continued in effect pending the outcome of appeal to the United States Supreme Court.

Plaintiff seeks this relief on the grounds that:

(a) He is suffering and will continue to suffer grave and irreparable harm if his application for employment is refused or judged on the basis of his alienage;

(b) The continuance of the temporary restraining order will not cause undue inconvenience to the defendants, but will prevent irreparable harm to the plaintiff;

(c) Plaintiff will expeditiously appeal to the United States Supreme Court.

DATED: New York, New York
August 5, 1976

/s/ Milton Pollack, U.S.D.J.

/s/ Henry F. Werker, U.S.D.J.

JUDGMENT ENTERED - September 1, 1976

/s/ Raymond F. Burghardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDMUND FOLEY, individually and on behalf of all other persons similarly situated, Plaintiffs, -against- WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his/her capacity as Director of Personnel of the New York State Police, Defendants.	Civil Action No. 75 CIV 4548 (M.P.)

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that EDMUND FOLEY, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order granting the Defendants' motion for summary judgment entered in this action on September 1, 1976.

This appeal is taken pursuant to 28 U.S.C. §1253.

/s/ JONATHAN A. WEISS
2095 Broadway, Suite 304
New York, New York 10023
(212) 595-1340
Counsel for Plaintiff

TO: Louis J. Lefkowitz
Attorney General of
the State of New York
Two World Trade Center
New York, New York 10047
Attn: Judith A. Gordon, Esq.
Attorney for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDMUND FOLEY, individually and on behalf of all other persons similarly situated, Plaintiff, -against- WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his/her capacity as Director of Personnel of the New York State Police, Defendants.	AFFIDAVIT OF SERVICE BY MAIL Civil Action No. 75 CIV 4748 (M.P.)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ELIZABETH MELENDEZ, being duly sworn, deposes and says: deponent is not a party to the above action, is over 18 years of age and resides at 3 Haven Plaza, New York, New York. That on the 21 day of October, 1976, deponent served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon Louis J. Lefkowitz, Attorney

General of the State of New York, Two World Trade Center, New York, NY 10047, Attention: Judith A. Gordon, Esq., the address designated by said attorney for that purpose by depositing a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the state of New York. All parties required to be served have been served.

/s/ ELIZABETH MELENDEZ

Sworn to before me this
21 day of October, 1976.

/s/ ANGELINA MITCHELL
NOTARY PUBLIC

Supreme Court, U. S.
FILED
JUN 11 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Appellant,

against

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of New York State Police,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT FILED
DECEMBER 20, 1976
PROBABLE JURISDICTION NOTED
MARCH 28, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Appellant,

-against-

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his capacity as Director of Personnel of New York State Police,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CONTENTS OF APPENDIX

	Page
Docket Entries	D-1

	Page
Amended Complaint	D-5
Answer	D-16
Order of December 30, 1975	D-21
Affidavit of William G. Connelie	D-23

In addition, the following items are included in the Appendix to the Jurisdictional Statement filed December 20, 1977, and incorporated by reference herein:

Opinion of the District Court	A-1
Order and Judgment of District Court	B-1
Notice of Appeal to the Supreme Court of the United States	B-4

APPENDIX

DOCKET ENTRIES

DATE	PROCEEDINGS
9/17/75	(1) Filed complaint and issued summons.
9/17/75	(2) Filed ORDER that James F. Browne is appointed to service the summons and complaint, etc. Clerk m/n.
9/19/75	(3) Filed ORDER, plaintiff permitted to take competitive exam for State Trooper scheduled to for 9/20/75; ordered that test results are not to be implemented and no rights therefrom shall attach in favor of plaintiff unless and until further order of Court directs, Pollack, J. (mn).
9/26/75	Filed Order to Show Cause re: 3-Judge Court, temporary restraining order, etc. Ret. 9/30/75 Room 1506, 2:00 p.m. Pollack, J. Dated 9/18/75(returned to M.P.).
9/09/76	Filed Stipulation and Order extending Defendants' time to answer complaint for 30 days from date of this stipulation; within 30 day period parties shall agree upon or Court shall permit Defendants may move for dismis-

DATE	PROCEEDINGS
	sal, etc. Pollack, J.
12/05/75	Filed Plaintiff's Amended Complaint.
12/15/75	Filed ANSWER of Defendants.
12/19/75	Pre-trial before Pollack, J.
12/30/75	Filed Designation of Judges. Beside Judge Pollack, Mansfield, & Werker. Order be filed. Kaufman, Ch. Judge, USCA.
12/30/75	Filed Stipulation and Order that action to proceed as class action. Plaintiff is representative of class consisting of all permanent resident aliens, etc. Pollack, J.
12/30/75	Filed ORDER. Plaintiff is representative of class. Matter be determined by 3-judge court. Pollack, J. (mn).
12/29/75	Filed Stipulation and Order that ¶¶4 and 5 of Stipulation signed 9/26/75 are continued as far as said paragraphs indicated. Pollack, J. (mn).
1/16/76	Pre-trial before Pollack, J.
2/04/76	Filed Memorandum in support of Plaintiff's motion for summary judgment.
3/30/76	Filed Affidavit by William G. Connelie for Defendants in support of constitutionality of portion of New York Executive

DATE	PROCEEDINGS
	Law which requires all members of New York State Police to be citizens of U.S.
3/31/76	Filed Defendants' Memorandum of Law in support of constitutionality of requirement of New York Executive Law that Members [sic] of United States.
4/15/76	Before Werker-on 3 Judge Court-Mansfield, Pollack & Werker.
4/15/76	Hearing begun and concluded-motion for preliminary and permanent injunction. Judge's decision reserved.
4/29/76	Filed Plaintiff's reply memorandum of law.
7/07/76	Filed Plaintiff's memorandum in support of motion for temporary restraining order.
7/09/76	Filed OPINION #44725, Mansfield(mn) Filed OPINION #44725. We uphold constitutionality of Sec. 215(3) New York Executive Law and grant summary judgment to the Defendants. SUBMIT ORDER. Pollack, J. & Henry F. Werker, J. (mn).
9/01/76	Filed Order and Judgment. Ordered that temporary restraining order signed on 9/19/75 and stipulated and so ordered on 12/22/75 restraining defendants William Connelie and S.A. Smith from refusing to accept Plaintiff's application for employment, etc. (b) refusing to assess Plaintiff's for employment as if he

DATE	PROCEEDINGS
	were a citizen of U.S. is continued in effect pending outcome of appeal to U.S. Supreme Court. (c) Plaintiff will expeditiously appeal to U.S. Supreme Court. Pollack, J. JUDGMENT ENTERED. Clerk (mn). Entered 9/2/76 (certified copy of above mailed to Clerk, U.S. Supreme Court - 9/2/76).
10/22/76	Filed Plaintiff's Notice of Appeal to Supreme Court of U.S. from final order granting Defendant's motion for summary judgment entered. 09/01/76. (Mailed copy to Louis J. Lefkowitz, Attorney General of the State of New York on 10/26/76)
4/05/77	Filed true copy of Supreme Court of U.S. that appeal from U.S. District Court, S.D.N.Y. case have been submitted and considered by Court, probable jurisdiction. Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDMUND FOLEY, individually and on behalf of all other persons similarly situated, Plaintiffs, -against- WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his/her capacity as Director of Personnel of the New York State Police, Defendants.	AMENDED COMPLAINT - CLASS ACTION 75 Civ. 4548 (M.P.)

I. PRELIMINARY STATEMENT

This is an action to permit a person, otherwise qualified, to compete for a position with the New York State Police without his being discriminated against because he is not a citizen of the United States.

II. JURISDICTION

1. The named plaintiff is a resident of the State of New York, County of Bronx, and of

the United States.

2. This court has jurisdiction of this action under 28 U.S.C. §1343(3). Defendants, acting under color of state law, have denied plaintiffs a right secured to them by the Fourteenth Amendment to the Constitution of the United States.

3. Declaratory and injunctive relief are authorized by 28 U.S.C. §§2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure.

III. THREE-JUDGE COURT

4. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 since plaintiffs seek an injunction to restrain defendants, who are state officers, from the enforcement, operation and execution of a state statute (New York Executive Law §215(3)) of statewide applicability on the grounds that the citizenship requirement of said statute is contrary to the Fourteenth Amendment to the Constitution of the United

States.

IV. PLAINTIFF

5. The named plaintiff, EDMUND FOLEY, is a citizen of the Republic of Ireland, and an alien lawfully admitted for permanent residence in the United States. The named plaintiff has been a resident of the State of New York since February, 1973.

V. CLASS ACTION ALLEGATIONS

6. The named plaintiff brings this action on his own behalf and, pursuant to Rule 23(a),(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated.

7. Plaintiff and approximately twenty-seven other persons were recently refused permission to take the competitive examination for State Trooper on the grounds of their alienage. It is not known how many other aliens have been discouraged from applying for the position of State Trooper because of the citizenship requirements of §215(3) of the Executive Law of the State of New York.

8. The members of the class similarly situated are all alien residents of the State of New York who have applied or will apply for the position of State Trooper, and who have been or will be refused permission to take the competitive examination for, and/or the opportunity to be considered for, appointment to that position solely on the grounds of their alienage, pursuant to §215(3) of the Executive Law of the State of New York.

9. The named plaintiff is a resident alien of the State of New York who is seeking appointment as a New York State Trooper, and as such will fairly and adequately protect the interests of the class.

10. The question of law common to the members of the class is whether the Fourteenth Amendment to the Constitution of the United States prohibits a state from discriminating against resident aliens in public service employment.

11. The remaining requirements of Rule

23 are further met in that: the class is so numerous that the joinder of all members is impracticable; the claims of the representative party are typical of the claims of the class; and the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

VI. DEFENDANTS

12. Defendant WILLIAM G. CONNELIE is the Superintendent of the New York State Police and is responsible for its administration.

13. Defendant S. A. SMITH is the Director of Personnel of the New York State Police and is responsible for the administration and implementation of personnel policies.

VII. STATEMENT OF THE FACTS

14. Section 215(3) of the Executive Law of the State of New York requires that all persons appointed to the New York State Police be citizens of the United States.

15. In August, 1975, the named plaintiff, a resident alien, submitted an application for employment to the New York State Police.

16. On August 20, 1975, defendant S. A. SMITH wrote to plaintiff informing him that his application for employment with the New York State Police was not being accepted because plaintiff was not a citizen of the United States. (See Exhibit A, attached hereto.)

17. As a result of defendants' actions pursuant to §215(3) of the Executive Law of the State of New York, plaintiff will not be permitted to take the competitive examination for the position of State Trooper scheduled for September 30, 1975.

18. The competitive examination for the position of State Trooper is only held every two or three years.

19. As a result of defendants' actions in refusing to permit plaintiff to take the competitive examination scheduled for September 30, 1975, plaintiff will suffer grave and irreparable harm in that plaintiff will have no other

opportunity to take such examination and qualify for appointment to the New York State Police because, by the time plaintiff becomes a citizen, he is likely to be too old to meet the age requirements of the New York State Police.

20. As a result of defendants' actions in not permitting plaintiff to take the competitive examination scheduled for September 20, 1975, plaintiff will suffer grave and irreparable harm with respect to employment opportunity, hiring priority, and job seniority.

21. As a result of defendants' actions in not accepting plaintiff's application for employment, plaintiff is suffering and will continue to suffer grave and irreparable harm, in that he is being arbitrarily and capriciously discriminated against solely because of his alienage.

VIII. CLAIM FOR RELIEF

22. By arbitrarily and capriciously discriminating on the basis of alienage, §215(3) of the Executive Law of the State of New York

denies plaintiffs the equal protection of the laws guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

IX. PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this court:

1. assume jurisdiction of this cause, convene a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 to determine this controversy, and set this case down promptly for a hearing;

2. alternatively, assume jurisdiction of this cause and set it down promptly for a hearing, without convening a three-judge court, on the grounds that the statute in question is in clear and obvious conflict with the Constitution of the United States;

3. determine by order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action;

4. enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57 and

58 of the Federal Rules of Civil Procedure declaring that §215(3) of the Executive Law of the State of New York, insofar as it excludes aliens from employment with the New York State Police, is invalid on the grounds that it violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States;

5. enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from continuing to discriminate against plaintiffs in their applications for employment solely on the grounds of their alienage, and further enjoining said persons to treat and judge plaintiffs' applications for employment on the same terms as all other applications filed during the same filing period, as if plaintiffs were United States citizens;

6. order the defendants, their successors in office, agents and employees, to notify

by certified, first-class mail, at their last known address, all persons whose applications for employment as a State Trooper have been refused pursuant to §215(3) of the Executive Law of the State of New York that they are now eligible to make such application and may reapply and will be given the competitive test and treated in all ways as a citizen whose application was correctly processed;

7. pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiff his costs herein, and also grant him such additional or alternative relief as may seem to this court to be just, proper, and equitable.

Dated: NEW YORK, NEW YORK
November 27, 1975

Respectfully submitted,

JONATHAN A. WEISS, Esq.
Attorney for Plaintiff
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

[Affidavit of Service Deleted]

NEW YORK STATE POLICE

STATE CAMPUS

Albany, New York 12226

August 20, 1975

Mr. Edmund Foley
2357 Walton Avenue
Bronx, New York 10468

Dear Applicant:

We regret to inform you that you do not meet all of the requirements for the New York State Police. The reason for your application not being acceptable is listed below:

_____Underage _____Overage

_____Unsatisfactory Driving Record

_____Unsatisfactory Court Record

__X__Not United States Citizen

_____Disqualified Physically

_____Not High School Graduate or in Possession of New York State Equivalency Diploma

Very truly yours,

/s/ S. A. Smith
Director of Personnel

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDMUND FOLEY, individually and on behalf of all other persons similarly situated, Plaintiffs, -against- WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his/her capacity as Director of Personnel of the New York State Police, Defendants.	ANSWER 75 Civ. 4548

Defendants, answering the Amended Complaint, by their attorney, LOUIS J. LEFKOWITZ, Attorney General, respectfully allege on information and belief:

FIRST: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph "I" that but for his alienage plaintiff is qualified to compete for a position with the New York State

Police and/or to be appointed to same, and defendants deny the allegation in Paragraph "I" that the exclusion of aliens from competition for appointment to the New York State Police or any limitations thereon constitute discrimination.

SECOND: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph "II".

THIRD: Deny each and every allegation in Paragraph "II,2" and "II,3" except admit that this Court has jurisdiction over the action under 28 U.S.C. §1343(3).

FOURTH: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs "IV" and "V".

FIFTH: Deny each and every allegation in Paragraphs "VII,17,18,19,20,21" and "VIII".

FURTHER ANSWERING THE AMENDED COMPLAINT AND AS AND FOR A

COMPLETE DEFENSE:

SIXTH: New York Executive Law §215(3) is constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, defendants pray for judgment declaring New York Executive Law §215(3) constitutional under the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution and for such other relief as to the Court shall seem proper in the premises.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
By:

/s/ JUDITH A. GORDON
Assistant Attorney General
Attorney for Defendants
Office and P.O. Address
Two World Trade Center
New York, New York 10047

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JUDITH A. GORDON, being duly sworn, deposes and says that she is an Assistant Attorney General and is authorized to make this verification; that she has read the foregoing Answer and knows the contents to be true except as to matters therein alleged upon information and belief and, as to those matters, she believes them to be true; that the source of her information and the basis for her belief are the books and records of the New York State Police and conversations with the officers and employees thereof; and that the reason this verification is not made by a party is that defendants are public officers and employees without personal knowledge of the facts.

/s/ JUDITH A. GORDON

Sworn to before me this
15th day of December, 1975

/s/ MARIA L. MARCUS
Assistant Attorney General
of the State of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDMUND FOLEY, individually and on behalf of all other persons similarly situated, Plaintiffs, -against- WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his/her capacity as Director of Personnel of the New York State Police, Defendants.	:	ORDER 75 CIV 4548 (M.P.)

Plaintiff having moved this Court for a determination that this action proceed as a class action and for the convocation of a three-judge court, upon a finding by this Court that: (1) the requirements of Rule 23(a),(b)(2), Federal Rules of Civil Procedure, have been met, and (2) that a three-judge court is required by 28 U.S.C. §2281, and upon consent of the parties, it is hereby

ORDERED that plaintiff Edmund Foley is the representative of a class consisting of all permanent resident aliens who, but for the enforcement of New York Executive Law §215(3), would otherwise be eligible to compete for employment in the competitive class for State Trooper; and it is further

ORDERED that this matter be determined by a three-judge court pursuant to 28 U.S.C. §2284.

DATED: New York, New York
December 30, 1975

/s/ MILTON POLLACK
U.S.D.J.

..[Attorney's Affidavit Deleted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his/her capacity as Director of Personnel of the New York State Police,

Defendants.

AFFIDAVIT

75 Civ. 4548

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

WILLIAM G. CONNELIE, being duly sworn, deposes and says:

1. I am the Superintendent of the New York State Police, a defendant in the within action both in my official and individual capacities. This Affidavit is submitted in support of the constitutionality of that portion of New York Executive Law, Section 215 (3), which requires that all members of the New York State

Police be citizens of the United States.

2. I have been Superintendent since June 25, 1975. Prior to assuming my present position, I served as a member of the New York City Police Department for 29 years. I served with the New York City Police Department as a patrolman, detective, sergeant of detectives, lieutenant of detectives, captain, deputy inspector, inspector, deputy chief inspector and assistant chief inspector, the position I held when I retired from the force.

3. As Superintendent I command all members of the New York State Police force. The force functions as a para-military organization. The Governor is the Commander-in-Chief of the State Police, and I report directly to him as his immediate subordinate officer. I am also a member of the Governor's Cabinet. As of this date, the State Police force has 3,316 members.

4. The State Police has the obligation throughout the State of New York to prevent and detect crime and apprehend criminals. Members of the force have the power to arrest, without

a warrant, any person committing or attempting to commit a crime within their presence, to execute search warrants and to exercise all other powers of police officers of the State of New York. The State Police is the only police force in New York with statewide jurisdiction, which it exercises concurrently with local police forces in our cities, including the City of New York.

5. Every member of the State Police is a police officer. Every officer is on call 24 hours per day, in the event of emergencies, and must take proper police action in the event that he observes the commission of a crime while off duty. Every officer is issued a weapon, which he must carry while on duty and which he is permitted to carry at all times he is off duty.

6. State Police officers are the representatives of the State of New York and serve as the embodiment of the political sovereignty of the State. They execute the essential political function of enforcing the criminal laws of

the State of New York, including the Penal Law and provisions of the Criminal Procedure Law, Public Health Law, Mental Hygiene Law, and Conservation Law, among others. In the execution of this law enforcement function, State Police officers are, in effect, the analog to the legislators, who enact those laws, and the judiciary, which interprets and adjudicates those laws. In this function, the State Police is one of the fundamental binding forces of the political community of the State of New York. Since a citizen is much more likely to encounter a State Police officer than a legislator or judge, the role of the police as a symbol and representative of the sovereignty of the State of New York is as a practical matter even greater.

7. The Legislature has required, in New York Executive Law Section 215(3), that all members of the State Police be citizens of the United States. I am informed by counsel that U.S. citizenship has been a requirement for membership in the force since the creation of the

force in 1917. To my knowledge, no person not a U.S. citizen has ever served as a member of the State Police in any capacity at any time. There is no provision in the Executive Law or elsewhere for the temporary or provisional appointment of non-citizens as State Police officers, and to my knowledge no such appointment has ever occurred.

8. The State Police has uniformed officers in its Uniform Force, and plainclothes detectives in its Bureau of Criminal Investigation ("BCI"). Members of the Uniform Force provide first-line police services to the citizens of New York, including responding to citizen complaints concerning the commission of crimes, conducting investigations into the commission of crimes, searching for missing persons, providing emergency first-aid in case of accidents such as near-drownings, seeking to arbitrate domestic quarrels and boundary disputes between neighbors, relaying blood in case of emergency and many other services, in addition to patrolling the highways of New York in

order to prevent and detect crime and apprehend criminals. The State Police, in 1974, made over 50,000 arrests for felonies, misdemeanors and offenses, for crimes ranging from homicide and assault to larceny and drug violations. Most such arrests involved a discretionary judgment by the arresting officer that acts and circumstances he observed constituted the commission of a crime. The force also issued in 1974, over 514,000 summonses for vehicle and traffic violations, many of which also involved discretionary judgments by officers.

9. The duties of the BCI are to conduct investigations into crimes beyond the investigatory resources of the Uniform Force, and to conduct independent investigations in such areas as narcotics and organized crime. Some such investigations are conducted in cooperation with federal and New York City law enforcement authorities, while others are handled alone. Some of these investigations require highly dangerous undercover work, and in 1974 one undercover State Police officer died of a gunshot wound

suffered while in the line of duty during such an investigation in New York City. The BCI also investigates, upon receipt of a citizen complaint, possible criminal activity relating to State security matters such as threats upon the life of the Governor or other elected officials, activities relating to the forcible overthrow of the government of the State of New York, or the bombing or destruction of State buildings or property.

10. The State Police also has a special unit known as the Governor's Detail, which is composed of both uniform troopers and plainclothes BCI detectives. This detail performs the vital functions of providing 24-hour a day protection to the Governor of our State, wherever he may be, including when he travels abroad to foreign countries. It may also be directed to provide protection for foreign dignitaries visiting the State of New York.

11. Among the duties of all members of the State Police is to assist federal authorities in the enforcement of the federal immi-

gration laws as they relate to illegal aliens present within the State of New York. In 1974 the State Police made 200 arrests of violators of those laws. Were an alien police officer called upon to arrest violators of those laws, especially violators of the officer's nationality, I believe a conflict of interest would exist for the officer, which would be intolerable to the State Police. Such a conflict might also exist in connection with the security services the State Police will be required to provide at the 1980 Winter Olympics in Lake Placid, New York.

12. Successful law enforcement requires State Police officers to execute their duties with proper regard for the constitutional rights and liberties of those with whom they come in contact. Officers must understand and respect the constitutional rights to privacy, counsel and due process enjoyed by every person they arrest, from the arrest through the arraignment process. Search warrants must be executed with regard for the rights of the individual named in

the warrant. Officers must exercise careful restraint in utilizing the authority to "stop and frisk" individuals in public. Police officers must also, at all times, seek to protect and enforce the citizens' First Amendment rights to freedom of speech and freedom of association which are so essential to the maintenance of all democratic freedoms. Because most police work is conducted beyond direct supervision, we must rely upon each officer's faithful and undivided allegiance to the Constitution and the individual rights guaranteed by it to assure protection of those rights in the many situations when the officer must make split-second decisions affecting them.

13. In addition to their other duties, State Police officers are, on occasion, required to prosecute vehicle and traffic law violators on behalf of the State of New York in the justice courts of our State. In such cases the officer presents evidence on behalf of the State and serves as a representative of the legal authority of the State in the proceeding. In such

cases his function is basic to the political sovereignty of the State.

14. The State Police, which functions as a para-military organization, is organized on the following basis: the Uniform Force consists, in rank order, of troopers (the entry-level position), sergeants, lieutenants, captains and majors. It is commanded by the Deputy Superintendent - Field Commander, who reports directly to me. The BCI, with similar ranks, is also commanded by the same individual. There is also a Deputy Superintendent - Administration, also reporting directly to me, who directs the communications function (supervising the New York State Police Information Network, which exchanges information with the National Crime Information Center in Washington, D.C.), and the Scientific Laboratory. We have divided the State into nine geographical regions, each of which is assigned a Troop, or complement of State Police officers (both Uniform and BCI). Within each region (also known as a Troop) is a Troop Headquarters, several troop stations and a number of "satellite"

troop stations (which are manned for only a portion of each day).

15. The largest number of our officers are troopers, who are appointed on the basis of a competitive examination and the satisfaction of certain other qualifications. Promotion to sergeant (a supervisory position) is also based upon competitive examination, which is open to every trooper, and promotion from sergeant to lieutenant is also based upon competitive examination open to every sergeant. Promotions above lieutenant and all appointments to the BCI are made by me, on the basis of merit and ability.

16. On the basis of the foregoing, I respectfully request this Court to uphold the constitutionality of that portion of New York Executive Law Section 215(3) which requires members of the New York State Police to be citizens of the United States.

/s/ WILLIAM G. CONNELIE

Sworn to and subscribed
before me on this 25th
day of March, 1976

/s/ RICHARD E. ROTH (sic)
NOTARY PUBLIC

Supreme Court, U. S.
FILED
MAR 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Appellant,

against

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of New York State Police,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellees move pursuant to Rule 16 of the Rules of this Court for affirmance of the judment of the United States District Court for the Southern District of New York, entered on September 1, 1976, declaring New York Executive Law § 215(3) valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Executive Law § 215(3) excludes aliens from membership in the New York State Police.

The procedural history of the case and facts set forth in appellant's Jurisdictional Statement, pp. 3-4

THE JUDGMENT BELOW, SUSTAINING THE EXCLUSION OF ALIENS FROM MEMBERSHIP IN THE NEW YORK STATE POLICE, CONFORMS WITH PRIOR DECISIONS OF THIS COURT.

New York State Police are officers of the executive branch of state government and perform governmental functions. New York Executive Law §§ 31, 210; New York Public Officers Law §§ 2, 3(1). *City of Albany* v. *Standard Accident Insruance Co.*, 8 A.D. 2d 247, 249, 18 NYS 2d 243, 244 (3rd Dep't 1959); Op. Atty. Gen., 13 St. Dept. 430 (1917); majority opinion, A25-A28.* Aliens have been excluded from the State police since the force was established in 1917.

The responsibilities of State police officers include protecting the life of the Chief Executive and the lives of visiting foreign dignitaries, protecting the people from subversion, riot and civil disorder and preventing and detecting crime.** Executive Law § 223; majority opinion, A25-A29. The officers carry weapons on duty and may carry them at all other times. They must take appropriate action whenever they observe criminal conduct and are on call 24 hours a day. Their jurisdiction is statewide. Majority opinion, A28.

State police officers perform discretionary functions. Majority opinion, A23-A24. Compare dissent, A50-A53. Perhaps, "[t]he most important facet of the patrol officer's work is the discretion that he exercises in dealing with

* References prefixed by the letter "A" refer to the opinions of the district court as reproduced in Appendix A to the Jurisdictional Statement filed herein.

** In 1974, the New York State Police made over 50,000 arrests for felonies, misdemeanors and offenses. Two hundred of these arrests were made assisting federal authorities in the enforcement of federal laws relating to illegal aliens.

everyday problems." F. Vandall, Training to Meet the Police Function, 1971 Wisconsin Law Review 547, 549 (1971). He must determine whether the conduct he has observed constitutes a crime and, in addition, is called upon to make decisions which are political, social and psychological in character and "very much affected by the democratic nature of American society." F. Remington, The Role of Police in a Democratic Society, 56 Journal of Criminal Law, Criminology and Police Service 361 (1965). He must be "personally committed to the proper application and enforcement of the laws of the United States" and of New York. Majority opinion, A29 quoting *United States v. Gordon-Nikkar*, 518 F 2d 972 (5th Cir 1975).

The district court majority first examined New York Executive Law § 215(3), the current statutory basis for excluding aliens from the State police, to determine whether the traditional or heightened equal protection test was appropriate. Majority opinion, A19-A22. It correctly concluded that the traditional test of reasonable relation to a legitimate State interest was appropriate. Majority opinion, A22-A24.

The majority view arises from and is consistent with the express limitations this Court placed on its holding in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973). The Court stated its "scrutiny" of classifications based on alienage would not be "so demanding" when it dealt with "matters resting firmly within a State's constitutional perogatives," "matters" including the "qualifications of an appropriately designated class of [State] public office holders." (413 U.S. at 648. "[I]mportant nonelective executive positions" and "officers who participate directly in the formulation [or] execution of broad public policy" were cited as examples of the classes of positions from which aliens could be excluded without strict scrutiny because the functions incident to the positions "go to the heart of representative government." 413 U.S. at 647. In light of the identifica-

tion of the State police officer with the executive branch, his obligation to protect the governmental structure and the constitutional rights of all persons and his discretion in the enforcement of criminal statues, the district court majority found that *Dougall* permitted review of Executive Law § 215(3) under the traditional equal protection test. Majority opinion, A22-A24.

The dissenting opinion (A48-A53) and appellant herein (Jurisdictional Statement, pp. 5-6) seeks to avoid the *Dougall* references to the executive and judicial branches of government, focusing almost entirely upon the voter and legislator as the only positions from which aliens can be excluded without strict scrutiny. This reading of *Dougall* is contrary language of the opinion which refers specifically to "important executive, legislative and judicial positions." 413 U.S. at 647. Nor is there any other basis for elevating the legislative over the executive and judicial functions given the American political tradition of three co-equal branches of government. The dissent's suggestion that "some high executive officials" (A50) could be included with legislators because they act "'politically.'" *Ibid.*, again opposes the *Dougall* language which includes policy "executors" as well as policy "formulators" and "important" positions in all three branches of government. 413 U.S. at 647. Nor is it apparent how the voter, legislator or high executive performs a more important function in representative government than does the State police officer who investigates subversion and decides whether to make an arrest, an act that necessarily results in the deprivation of individual liberty.

Although the district court majority found Executive Law § 215(3) could be properly reviewed under a traditional reasonable relation test, it afforded close judicial scrutiny to the state interests supporting the statute, effectively foreclosing the arguments presented by the dissent and appellant herein. Majority opinion, A24-A41.

Executive Law § 215(3) invokes at least three state interests: the state's right to conduct its sovereign affairs through the agency of citizens not aliens, the need to avoid divided allegiances in performance of police duties and the need for state police officers to be personally committed to the proper application of the laws. See majority opinion, A29-A41. This Court has already recognized that the state has a substantial interest in defining its own form of government and limiting participation in that government to individuals who are within the "political community". *Sugarman* v. *Dougall*, 413 U.S. at 642-643, 646-649; *Dunn* v. *Blumstein*, 405 U.S. 330, 344 (1975). It is not seriously questioned that the duties of State police officers are in aid of the preservation of government and are thus sovereign within the meaning of the *Dougall-Blumstein* formulation. The dissent questions, however, whether the duties are sovereign enough to warrant the exclusion of all aliens. Appellees submit that the point must be viewed as foreclosed in their favor by the summary affirmance in *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md 1974), aff'd 426 U.S. 913 (1976). The State police officer does not perform a lower or less sovereign function than the federal or state juror. Instructions to juror are more specific than the criminal statutes under which the police officer operates. The suggestion that jurors must be selected expeditiously and thus that administrative convenience allows only those who are already citizens cannot sustain the statute under strict scrutiny, e.g. *Sugarman* v. *Dougall*, 413 U.S. at 645-46; *Graham* v. *Richardson*, 403 U.S. 365, 376 (1971), and is false in addition. Dissenting opinion, A62-A63-A3. Unusual expedition in the preparation of lists of qualified jurors is not required, and the same tests could be used to qualify alien jurors as the dissent contemplates should be used to qualify alien police officers.

Appellant's suggestion that *In re Griffiths*, 413 U.S. 717 (1973), foreclose the issue presented herein in his favor because the attorney performs a higher sovereign function

than the State police officer is equally unsound. Jurisdictional Statement, pp. 7-8. As *Griffiths, supra,* held, the attorney is not a governmental official simply because he is a member of the Bar, and governmental activities may have only a tangential relationship to his practice. The decision does not suggest that citizenship is not an appropriate qualification requirement for an attorney who stands in as close a relationship to the government as the State police officer.

As the district court majority observed, the need for the State police officer to be free of allegiance to the country of his nationality and to be personally committed to the proper application and enforcement of American Laws is profound. A29-A30, A37-A36. The description of the alien as having, at best, divided allegiance is not, as the dissent suggests, a matter of the alien's personal choice, subject to individual investigation and empirical findings. It is a legal result of alien status and can be removed only by naturalization, e.g. *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 585 (1952). Equally, the State need not entrust its self-preservation to individuals who have not yet made an affirmative commitment to its political community. To the extent that an alien may wish to make such a commitment but is disabled from doing so because of durational residence aspects of the naturalization process, his dilemma is beyond the state's power to adjust. Majority opinion, A25-A36.

CONCLUSION

The judgment below declaring New York Executive Law § 215(3) constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution should be affirmed.

Dated: New York, New York
March 6, 1977

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Appellant,

-against-

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S.A. SMITH, individually and in his capacity as Director of Personnel of New York State Police,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

INTRODUCTION

The purpose of this Reply Brief is to call to the attention of the Court certain authorities which were not available when Appellant filed his Jurisdictional Statement and Motion for Summary Reversal, and which are relevant to the issues raised by the Appellees in their Motion to Affirm.

ARGUMENT

In Chavez-Salido v. Cabell, 45 U.S.L.W. 2389 (C.D. Cal. Feb. 3, 1977), a three-judge federal court for the Central District of California unanimously declared unconstitutional California Government Code §1031(a) which made citizenship a prerequisite for appointment to any governmental position declared to be that of a peace officer. A copy of the District Court's opinion is attached as Appendix C.* The Court concluded that the citizenship requirements of the statute violated the Fourteenth Amendment's equal protection clause both on its face, encompassing all "peace officers," and as applied to the position of deputy proba-

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*Appendices A and B appear at the back of the Jurisdictional Statement.

tion officer. App. at C2.

The Court analyzed the duties of a probation officer, which include both recommendations as to sentencing and investigation of probation violations, and concluded that these duties "'hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens.'" App. at C49-50, quoting In re Griffiths, 413 U.S. 717, 724 (1973). Compare Motion to Affirm at 4. The Court clearly felt that the class of "important nonelective executive, legislative, and judicial positions" in which "citizenship bears some rational relationship to the special demands of the particular position," see Sugarman v. Dougall, 413 U.S. 634, 647 (1971), was a narrow one: it suggested, for example, without reaching the issue, that California might constitutionally enact a citizenship requirement for a narrowly defined class of the most important peace officers, e.g., city police chiefs. App. at C50 fn. 24. This reading of

the Sugarman "exception" to the strict scrutiny requirement is the same as adopted by Judge Mansfield of the Second Circuit, dissenting below, see App. at A47-51, and is clearly the correct one. Since the vast majority of New York State Troopers do not approach this plane of policy-making, it is clear that New York must come forward with a compelling state interest to justify its continued exclusion of aliens from the state police. In re Griffiths, supra; Graham v. Richardson, 403 U.S. 365, 372 (1971).

The arguments presented by the Appellees, however, do not even meet the minimal requirements of the "rational relationship" test. As noted in the Jurisdictional Statement and in the dissent below, the imposition of a citizenship requirement does nothing to advance the interests of New York allegedly at stake. On the contrary, it is evident that the exclusion of aliens from police forces actually impairs the effectiveness of those forces in the

performance of their duties.

In a report entitled "Policed by the White Male Minority" (October, 1976), the Florida Advisory Committee to the United States Commission on Civil Rights strongly condemned Florida's statutory exclusion of aliens from police forces.* The Committee noted that Florida (like New York) has a very large population of resident aliens, and found the citizenship requirement to be "a hardship for Cubans and for the police who must serve and protect these people of another culture and language." Id. at 22. The Committee concluded that

> the employment of resident aliens by the Miami Police Department in proportions approximating their presence in their respective ethnic population in the city would be a positive factor in developing and maintaining healthy police-community relations in the city of Miami. Id. at 72.

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*Fla. Stat. Ann. §943.13 (Supp. 1976).

After reaching the same conclusion with respect to the Dade County Department of Public Safety, id. at 85, the Committee, which had previously expressed its own doubts about the constitutionality of Florida's exclusion of aliens from its police forces, id. at 71-72, 84-85, recommended that the United States Department of Justice be urged to "consider the advisability of challenging the statute in the appropriate federal district court." Id. at 72, 85.

From the foregoing, it is apparent that the issue presented by the instant case is an important one. It is also apparent that the decision reached by the majority below was incorrect. Therefore Appellants respectfully urge this Court to note probable jurisdiction and set the cause for oral argument, or, in the alternative, summarily reverse the decision of the District Court.

DATED: New York, New York
March 14, 1977

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE CHAVEZ-SALIDO, RICARDO [illegible] and PEDRO LUIS [illegible], Plaintiffs, v. [illegible] E. CARGILL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NEVINS, in his official capacity as Chief Personnel Officer for the County of Los Angeles, and the COUNTY OF LOS ANGELES, a body politic, Defendants.	OPINION NO. CV 76-0641-IH

Before STANLEY N. BARNES, Senior Circuit Judge, JESSE W. CURTIS, Senior District Judge, and IRVING HILL, District Judge.

HILL, District Judge:

In this opinion in a case of first im-

pression, we declare unconstitutional California Government Code §1031(a). That section provides that one must be a citizen of the United States to hold any governmental position, state, county or local, which is declared by law to be a peace officer or which has the powers of a peace officer. The case is brought by three plaintiffs who applied for, and were denied, appointment to the position of Los Angeles County deputy probation officer solely because of the statutory requirement of American citizenship. Under California Penal Code §830.5 a deputy probation officer is declared to be a peace officer and is therefore subject to the citizenship requirement of Government Code §1031(a). We hold §1031(a) to be both unconstitutional on its face and unconstitutional as applied. We also hold that a county may be held liable for damages in an action brought directly under the 14th Amendment and in an action brought under 42 U.S.C. §1981.

I

FACTS

Plaintiffs, CHAVEZ-SHIELD, VERNAZ AND SCHUMACHER, as of the date the complaint was filed, were lawfully admitted permanent resident aliens living in Los Angeles County. In a single-count first amended complaint seeking both injunctive relief and damages, they sue Los Angeles County, its Chief Personnel Officer, its Acting Chief Probation Officer and the Personnel Officer of the County's Probation Department.[1] The case was tried without live witnesses. Most of the facts were stipulated to and some additional facts were received by uncontradicted affidavits.

Each of the plaintiffs has applied for appointment to the County Probation Department as a Deputy Probation Officer II. This position

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[1] Defendant WILSVIG has been succeeded as Chief Personnel Officer of the County by Harry L. Hufford. Defendant CARTER has been succeeded as Chief Probation Officer of the County by Kenneth Pate. In both situations the successor automatically has been substituted for his predecessor under Fed. R. Civ. P. 25(d)(1).

carries a salary of $1,185 per month. There are some factual differences in the status of the three plaintiffs and in the treatment accorded their applications.

CHAVEZ-SALIDO has resided here as a lawfully admitted permanent resident alien since 1955. His application to become a Deputy Probation Officer II was filed on March 27, 1975. An oral examination is given for this position, with 70 being the minimum passing grade. CHAVEZ-SALIDO took the examination May 1, 1975, scored 95, and was notified that he was being placed on the eligibility list. In September, 1975, he was notified that a job opening existed. But shortly thereafter he was told he would have to show proof of citizenship to receive an appointment. Being unable to do so, he was denied employment. The denial is stipulated to have been solely the result of the citizenship requirement of Government Code §1031(a).

The County also has a position called Deputy Probation Officer Trainee, paying substan-

tially less than Deputy Probation Officer II. The Trainee position does not require citizenship since it is not given by law the status or powers of peace officer. CHAVEZ-SALIDO was offered the Trainee position on December 1, 1975 and accepted it. He had applied for American citizenship well before applying to become a probation officer. His citizenship petition was granted and he was made a citizen on March 15, 1976. However, by that time, his name had been taken off the eligibility list for Deputy Probation Officer II. In August, 1976, he was promoted to the position of Deputy Probation Officer I. The Officer I position pays more than the Trainee position but less than the Officer II position and citizenship is required for it.

Plaintiff YBARRA has been a lawfully admitted permanent resident alien since 1972. On August 22, 1975 he applied for the position of Deputy Probation Officer II. He scored 70 on the examination. On the same date YBARRA also applied for the Trainee position. On October 8,

1973 he applied for the position of Deputy Probation Officer I. He passed the Officer I examination with a score of 80. He was told that he was qualified for both probation officer positions, that there was a job open in the I category, but no job was open in the II category although he would be placed on an eligibility list for the latter. He was also told that for both probation officer positions he was required to present proof of citizenship. Being unable to do so, he was denied the Officer I appointment and a position on the eligibility list for Officer II. It is again stipulated that these denials were solely the result of the statutory citizenship requirement. YBARRA was employed by the Los Angeles City Housing Authority during the entire application and examination period and apparently is still so employed. YBARRA has not to this date applied for American citizenship.

Plaintiff BOHORQUEZ has been a lawfully admitted permanent resident alien since 1961. At the time the case was argued, he had never

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applied for American citizenship and, so far as we know, has still not done so. His application for the position of Deputy Probation Officer II was filed January, 1970. He was given the oral examination on May 5, 1970 but during the examination was told that he could not receive an appointment to the position sought because of his lack of citizenship. He was subsequently notified that he had failed to achieve a passing score of 70 on the examination. There is a procedure whereby an applicant can appeal his examination results. BOHORQUEZ was notified that because he failed to meet the citizenship qualifications it would be useless to appeal. He therefore did not appeal and has refrained from filing further applications, though he is still desirous of appointment. BOHORQUEZ was unemployed at the time of his application and examination and has remained unemployed since. It appears that he never sought appointment as a Probation Officer Trainee. Whereas CHAVEZ-SALIDO and YBARRA seek dar-

ages by way of back pay as part of their relief, ECHORQUEZ seeks only the opportunity to take a new examination.

Each plaintiff was at all times willing to take the loyalty oath prescribed in the California Constitution for all public employees. Cal. Const. Art. XX §3. That oath includes an agreement to support and defend the Federal and State Constitutions.

The first amended complaint, upon which the case was tried,[2] challenges §1031(a) and the citizenship requirement therein contained, under the equal protection clause of the 14th Amendment and under two provisions of the Civil Rights Acts, 42 U.S.C. §§1981 and 1983. These challenges articulate a claim of unlawful discrimination on the basis of alienage. In addition, the complaint asserts that §1031(a) unconstitutionally infringes upon plaintiffs' right to travel and upon Congress' power to regulate aliens. The latter also invokes the supremacy clause of the federal Constitution. Each plaintiff seeks a declaratory judgment invalidating the statute and injunctive relief prohibiting its application to him. All three plaintiffs seek attorneys' fees. As stated, two plaintiffs seek money damages.

Plaintiffs requested the convening of a three-judge court under 28 U.S.C. §§2281 and 2284.[3] Defendants agreed that a three-judge court should be convened and the Chief Judge of the Circuit appointed the members of the three-

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[2] The first amended complaint was originally drawn as a class action. Before the trial, by stipulation of all parties, an order was entered striking all class action claims and aspects.

[3] During the pendency of the action, Congress enacted new legislation substantially limiting the availability of three-judge courts. The Three-Judge Court Amendments of 1976, Pub.L. No. 94-381. The new law by its terms does not apply to actions commenced before its enactment, i.e. August 2, 1976, and thus the instant case was unaffected by the new statute.

judge court on April 28, 1976.(4) The case was tried and argued August 20, 1976.

II

JURISDICTION

The individual defendants do not contest the jurisdiction of this court to entertain the instant action against them. They apparently concur in plaintiffs' assertion that a claim is

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(4) We are aware, of course, of the teaching of the Supreme Court in Hagans v. Lavine, 415 U.S. 528 (1974). Hagans holds that before resorting to a three-judge court, the single district judge should exhaust all potentially dispositive claims within his jurisdiction. The claim in the instant case of invalid state intrusion into the federal power to regulate immigration is not based on any alleged conflict between §1031(a) and any specific federal law or regulation. Plaintiffs refer only generally to the Immigration and Naturalization Act, 8 U.S.C. §1101 et seq. Hagans describes a claim that direct conflict between a specific state statute and a specific Congressional enactment renders the state statute "unconstitutional." The opinion in Hagans denominates such a conflict claim as "statutory" and differentiates it from a claim of a clearly constitutional nature. Hagans holds that the single district judge must decide such a statutory claim before requesting that a three-judge court be convened to consider other claims. The supremacy clause claim of the plaintiffs here, like their other claims of unconstitutionality, de-

stated against them which is cognizable under 42 U.S.C. §1983, with jurisdiction according to this Court under 28 U.S.C. §1343(3). Section 1983 imposes liability on any person who, under color of state law, deprives another of 'any rights, privileges, or immunities secured by the Constitution....' Section 1343(3) grants to the district courts original jurisdiction to redress any deprivation of constitutional rights of the type described in §1983.

But Defendant Los Angeles County does contest our jurisdiction. Plaintiffs argue that their complaint states a claim against the County both for violation of their equal protection rights under the 14th Amendment and for

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rives "exclusively and directly from the Federal Constitution rather than from federal legislation [and] entail[s] an immediate resort to the Constitution...." Norwick v. Nyquist, 417 F.Supp. 913, 916 (S.D.N.Y. 1976). All of the claims of the instant plaintiffs are of a clearly constitutional nature. None of the claims is "statutory" in the Hagans context. Therefore, in our view, a three-judge court was properly convened.

violation of 42 U.S.C. §1981. Section 1981 in relevant part reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State...to make and enforce contracts, to sue, ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...."

Plaintiffs argue that if a claim is stated under either or both of these bases, our jurisdiction over the County derives from 28 U.S.C. §1331(a), the general grant to the district courts of federal question jurisdiction. Section 1331(a) confers jurisdiction in all civil actions which arise "under the Constitution, laws or treaties of the United States" and "wherein the matter in controversy exceeds the sum of value of $10,000...."

Defendant County strongly urges that it, as a political subdivision, is not suable under §1981. The County unfortunately took no position, either in its brief or in argument, as to plaintiffs' asserted alternative basis of liability, i.e. direct violation of the 14th Amendment. We have examined both bases as well as the question of the existence in this case of the $10,000 amount in controversy requirement under §1331(a).

We hold that the complaint states a cognizable claim against the County on both 14th Amendment and §1981 grounds and that the amount in controversy exceeds $10,000. Therefore, we hold that this court has jurisdiction of the claim against the County under §1331(a).

(A) The Section 1981 Claim

It is settled that the right to be free from illegal discrimination in employment is encompassed within the right "to make and enforce contracts" protected by §1981. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). Johnson involved racial discrimination in employment. In Graham v. Richardson, 403 U.S. 365,277[sic] (1971) the Supreme Court held that aliens are within the class protected by §1981 and may utilize that section as plaintiffs.

Graham involved welfare benefits. Although neither the Supreme Court nor our Circuit have spoken on the question of alienage discrimination in employment, the Fifth and Seventh Circuits in carefully considered opinions, and a number of district courts, have held that §1981 applies to discrimination in employment based on alienage as well as to employment discrimination which is racially based.(5) We choose to follow those holdings.

So we turn to the question of whether an action under §1981 may be maintained against a

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(5) Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974); Roberts v. Hartford Ins. Co., 177 F.2d 811 (7th Cir. 1949), cert. denied, 339 U.S. 920 (1950); Spiess v. C. Itoh & Co. (America), Inc., 408 F.Supp. 916 (S.D. Tex. 1976); Hollander v. Sears Roebuck & Co., 392 F.Supp. 90 (D.Conn. 1975); Mohamed v. Parks, 352 F.Supp. 518 (D.Mass. 1973); Lopez v. The White Plains Housing Authority, 355 F. Supp. 1016 (S.D.N.Y. 1972); League of Academic Women v. Regents of Univ. of Calif., 343 F.Supp. 636 (N.D. Cal. 1972). Cf. Campbell v. Gadsen County District School Board, 534 F.2d 650 (5th Cir. 1976).

political subdivision of a state.

Since Monroe v. Pape, 365 U.S. 167 (1961) it has been established law that a political subdivision of a state is immune from a damage claim under §1983 because it is not a "person." And that immunity has been extended to claims for injunctive relief. City of Kenosha v. Bruno, 412 U.S. 507 (1973).

Since §§1981 and 1983 are parts of what is generally called the Civil Rights Acts, it is tempting to argue that a political subdivision's immunity from suit under one section extends to the others. And our Circuit in Arunga v. Weldon, 469 F.2d 675 (9th Cir. 1972) appears to have accepted that argument, holding that a political subdivision is also not amenable to suit under §1981. The County's claim that it cannot be sued under §1981 is founded almost exclusively on Arunga.

We have pondered the Arunga opinion and in so doing, we have examined the record and the briefs. We believe, with the utmost respect,

that Arunga may have been insufficiently considered and that it reaches an incorrect result. One district court in this district has previously declined to follow Arunga, League of United Latin American Citizens v. City of Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976), and we do likewise. We also believe that whatever authority Arunga has, has been undermined by language in a more recent decision of the Supreme Court.

Arunga was an action brought in pro per by a black legally admitted resident alien of Kenyan nationality. He sued the City of Alameda and one of its police officers (who was never served) for a claimed physical assault arising out of an allegedly unlawful arrest.(6)

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(6) Arunga's papers throughout the record demonstrate that he was both unlearned and confused. The amended complaint is in one count; its jurisdictional paragraph cites only §1983. A later paragraph merely mentions §§1981 and 1985 along with §1983. The complaint does not mention §1986 at all. The gravamen of the complaint is a prayer for money damages of $1.5 million dollars as general and exemplary damages for the assault upon plaintiff and his physical

(Footnote 6 cont'd)

and mental suffering. Some of the damages sought for mental suffering are claimed to be for the emotional effect upon plaintiff of his grandfather's premature death resulting from the "humiliation" to plaintiff. Plaintiff denominated his case as a class action and for some obscure reason prayed that a three-judge court be convened for the purpose of declaring unconstitutional Article 11, Section 11 of the California Constitution which confers local police power upon counties and cities.

In the City's original motion to dismiss, the points and authorities supporting it consisted of one sentence which asserted that "a city is not a 'person' under 42 U.S.C. §§1981-88." The motion to dismiss the amended complaint was likewise supported by a single sentence argument as follows:

> "Plaintiff's 'AMENDED PLEADING' adds nothing except jibberish and still fails to state a cause of action against the City." Diamond v. Pitchess, 411 F.2d 565 (9th Cir. 1969); Brown v. Town of Caliente, 392 F.2d 546 (9th Cir. 1968).

Diamond and Brown are both §1983 cases declaring municipal immunity. The trial court in neither of its dismissal orders cited any authority or stated any reason.

Arunga's brief on appeal does not mention §1981 and does not even mention the suability of a political subdivision under any of the Civil Rights Acts. His brief is almost entirely devoted to the three-judge court issue and a discussion of state police power. The city's brief on appeal devotes only seven lines to the

suability question, as follows:

> "It is clear that a City may not be sued under 42 U.S.C. §§1981-85. Monroe v. Pape, 365 U.S. 167 (1961); Moor v. Madigan, F.2d (9th Cir. No. 71-3019; 71-3020, March 1972); Diamond v. Pitchess, 411 F.2d 565 (9th Cir. 1969); Brown v. Town of Caliente, 392 F.2d 546 (9th Cir. 1968). Under the authorities cited, the District Court was unquestionably correct in dismissing plaintiff's action as to the City."

The trial court twice granted the City's motion to dismiss for lack of jurisdiction. The first grant was with permission to amend, and following submission of an amended complaint, the second dismissal was granted without leave to amend. The appeal followed. In the Court of Appeals the matter was submitted without argument. The opinion is per curiam and in two short paragraphs:

> "The plaintiff filed an action against the City of Alameda alleging that he had been deprived of rights in violation of 42 U.S.C. §§1981 and 1986. The complaint was dismissed on motion upon the ground that the City is not a "person" and cannot be sued under the Civil Rights Act. [sic] An amended pleading based upon the same statute against the same defendant was again dismissed and this appeal taken.
>
> It is abundantly clear that a municipal corporation is not a "person" subject to suit under 42 U.S.C. 1983. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961); Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972); Diamond v. Pitchess, 411 F.2d 565 (9th Cir. 1969). The district

court was unquestionably correct and we affirm." (Footnote omitted)

We believe the first sentence of the opinion to be factually incorrect because we cannot find in the amended complaint any claim of a violation of §1986. The second paragraph of the opinion, which contains the holding, makes what we believe a fundamental error with respect to §1981, i.e. the assumption that liability is imposed by §1981 only upon "persons." Whereas §1983 does use that term defining who is liable, §1981 does not use the term nor does it limit in any way who may be liable as a defendant for a violation.

It is unfortunate but understandable that the Arunga opinion assumes that various of the of the Civil Rights Acts (42 U.S.C. §1981 through §1988) and particularly §§1981, 1982 and 1983, should be construed and applied according to common rules and principles. This approach may well result from the fact that all of the substantive Civil Rights Acts were cod-

ified together in 1874 in the Revised Statutes.(7) But it ignores certain other important historical facts: (1) that §§1981 and 1982, which are companion sections, were originally enacted in 1866, whereas §1983 did not become law until 1871(8) and (2) that §§1981 and 1982 are derived from, and based upon, the 13th Amendment, whereas §1983 was enacted to implement the 14th Amendment.(9)

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(7) For further discussion of the history of the codification, see Runyan v. McCrary, ___ U.S. ___, n.8, ___ S.Ct. ___, ___ n.8 (1976).

(8) With respect to the other parts of what has been called "The Civil Rights Acts," §§1987 and 1988 were enacted along with §§1981, and 1982, in 1866, and §1986 was adopted with §1983, as part of the Ku Klux Klan Act of 1871, ch.22, §1, 17 Stat. 13. A part of §1985 was originally enacted in 1861, but the present full §1985 was also adopted in 1871. Section 1984, which grants no substantive rights, was not enacted until 1875. Act of March 1, 1875, ch. 114, §5, 18 Stat. 337.

(9) In addition to §§1981 and 1982, §§1987 and 1988 are also based upon the 13th Amendment, while §§1985 and 1986, along with §1983, were enacted pursuant to the 14th Amendment.

As the Supreme Court points out in Monroe, the legislative history of §1983 and the use of the term "person" therein, preclude its application to political subdivisions. But a careful examination of the legislative history of §§1981 and 1982 establishes, we think, with equal clarity, that political subdivisions were intended to be included within their ambit. The legislative history of §1981 to which we refer has been extensively collated by at least three other district courts. Robinson v. Conlist, 385 F.Supp. 529 (N.D.Ill. 1974); Maybanks v. Ingraham, 378 F.Supp. 913 (E.D.Pa. 1974; League of United Latin American Citizens v. City of Santa Ana, supra. It serves no useful purpose for us to duplicate or reproduce those discussions; we incorporate them by reference.

The Supreme Court, post-Arunga, has said in analyzing §1982:

> "[L]ike the Amendment upon which it is based, §1982 is not a mere prohibition of State laws establishing and upholding racial discrimination in the sale and rental of property, but rather [is], an 'absolute' bar to all such discrimination, private as well as public, federal as well as state." District of Columbia v. Carter, 408 U.S. 418, 422 (1974).

We read this language as an affirmation that all sources of discrimination, including governmental entities, are reachable under §1982.

Because they are companion sections, having a common derivation and legislative history, it would appear that what applies to §1982 applies with equal force to §1981.(10)

Unfortunately, the Supreme Court has not yet decided the question of whether political subdivisions are suable under §1981. One circuit and a number of district courts have held, as we hold, that they are.(11) Two district

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(10) Jones v. Alfred Mayer Co., 392 U.S. 409, 422 n. 78 (1968); Bowers v. Campbell, 505 F.2d 1155, 1157-58 (9th Cir. 1974); Macklin v. Sperton Freight Systems, Inc., 478 F.2d 979, 993-94 (D.C. Cir. 1973).

(11) Campbell v. Gadsen County District School Board, supra note 5; League of United

courts outside our Circuit, relying on Aruncga, have held that they are not.(12) The lack of a definitive Supreme Court decision and the paucity of other authority since Arunga probably results from the passage of the 1972 amendments to Title VII of the Civil Rights Act of 1964, making political subdivisions amenable to suit under Title VII for discrimination in employment.(13) The confusion caused by Arunga leads us to the fervent hope that our Circuit will shortly have occasion to take a second look at the legal question decided in it.

(fn. 11 cont'd) Latin American Citizens v. City of Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976); Robinson v. Conlisk, 385 F.Supp. 529 (N.D. Ill. 1974); Hines v. D'Artors, 383 F.Supp. 181 (W.D. La. 1974); Maybanks v. Ingraham, 378 F.Supp. 913 (E.D. Pa. 1974).

(12) Redding v. Medica, 402 F.Supp. 1260 (W.D. Pa. 1975); Black Brothers v. City of Richmond, 386 F.Supp. 147 (E.D. Va. 1974).

(13) Plaintiffs in our case cannot resort to Title VII because discrimination based on alienage is not included within the types of discrimination prohibited by it. Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1974).

(2) The 14th Amendment Claim

A claim cognizable in this court is stated against the County under the 14th Amendment. Relatively recent authority makes clear that political subdivisions of states are answerable in the district courts for direct constitutional violations in a complaint seeking injunctive relief, damages or both, despite the absence of any statute specifically creating the cause of action.

In 1971 the Supreme Court held in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) that, without an enabling statute, liability in damages existed for direct constitutional violations with district court jurisdiction being found in §1331(a). The defendants in Bivens were federal FBI agents and the direct constitutional violation alleged was a 4th Amendment violation. No extension of Bivens to agents of state or local government was needed since 42 U.S.C. §1983 provided a specific remedy in the federal courts against them, and 28 U.S.C.

§1343(3) provided clear federal jurisdiction.

Utilizing the Bivens rationale, the Supreme Court later clearly implied that an action may be brought in the federal courts against political subdivisions of states for direct constitutional violations including 14th Amendment violations. City of Kenosha v. Bruno, supra.(14) After twice declining to decide that question,(15) our own Circuit has now specifically decided it. Relying on Kenosha, the Circuit held that political subdivisions of states may be sued for both damages and equitable relief for constitutional violations, with jurisdiction being provided by §1331(a). Gray v. Union County Intermediate Education Department, 511 F.2d 803, 805 (9th Cir. 1975).(16) Gray involved a school district but the court char-

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(14) Plaintiffs were holders of retail store and tavern liquor licenses whose renewal applications had been denied by the two defendant cities under procedures set up by state statute. Alleging that their renewal applications were unconstitutionally denied, they sought injunctive relief including a declaration that the statutes involved were unconstitutional. A three-judge district court held that a claim under §1983 was properly pled against the cities because only equitable relief was sought, and found jurisdiction under §1343(3). The Supreme Court reversed the §1983 holding but remanded the case rather than ordering judgment for the defendant cities. The remand order assumed that jurisdiction might well exist under §1331(a) if the requisite amount in controversy was shown to exist. Two Justices, in a concurring opinion, viewed the remand as a holding by the Court, for the first time, that jurisdiction existed under §1331(a) for actions against a city charging direct constitutional violations. See concurring Opinion of Brennan, J., 412 U.S. at 516.

(15) Aldinger v. Howard, 513 F.2d 1251 (9th Cir. 1975), aff'd, ____ U.S. ____, 96 S.Ct. ____ (1976); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).

(16) The Third and Fifth Circuits and other district courts are in accord that direct constitutional causes of action may be maintained against political subdivisions of states. Reeves v. City of Jackson, 532 F.2d 791 (5th Cir. 1976); Skehan v. Board of Trustees, 501 F.2d 31 (3rd Cir. 1974); Redding v. Medica, 402 F.Supp. 1260 (W.D. Pa. 1975); Williams v. Brown, 398 F.Supp. 157 (N.D. Ill. 1975); Haybanks v. Ingraham, supra, note 8; Dahl v. Palo Alto, 372 F.Supp. 647 (N.D. Cal. 1974). But Cf. Brault v. Town of Milton, 427 F.2d 730 (2d Cir. 1975) (en banc).

acterized a school district as a "political subdivision" of a state. Id.

(C) Amount In Controversy

Having determined that a claim "arising under the Constitution" and one also arising "under the laws" of the United States are presented, we have jurisdiction of that claim under §1331(a) if the "amount in controversy exceeds $10,000."

The amount in controversy must be found to exist under §1331(a) as to each plaintiff. Zahn v. International Paper Co., 414 U.S. 291 (1973). If attention is focused solely on the amount of awardable money damages, one might entertain a substantial doubt about the existence of the requisite $10,000 jurisdictional requirement in this case. No plaintiff pleads money damages in any specific amount. One plaintiff seeks no money damages at all. The other two, who were employed in other positions during the period in question, seek damages con-

sisting of "back pay and seniority benefits." If each of those plaintiffs must offset, by way of mitigation, the wages and benefits earned at other work, it is quite clear that neither could be awarded damages which exceed $10,000.(17)

But it is not proper, in deciding the amount in controversy, to focus solely on the money damage aspect of this case. Equitable relief by way of injunction, is also sought here. In Glenwood Light & Water Company v. Mutual Light, Heat & Power Co., 239 U.S. 121 (1915), the Court said of injunctive actions:

> "... The jurisdictional amount is to be tested by the value of the object to be gained by the complainant." 239 U.S. at 121.

And of civil rights actions under 28 U.S. §1331,

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(17) The difference in pay between the trainee position accepted by Chavez-Salido and the position he now seeks is $333 per month and the period of denial is less than 10 months. As to Ybarra, the evidence indicates that he earned an average of about $900 per month during the denial period in the job at the Housing Authority. For Ybarra, the denial period does not exceed 14 months.

the County is granted to us under §1331(a).(19)

III

THE MERITS

In three recent cases the Supreme Court has invalidated state statutes or regulations requiring citizenship as a condition of obtaining public employment or licenses.(20) In

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(19) We also note, sua sponte, that jurisdiction of the claim against the County may also exist under another jurisdictional statute, 28 U.S.C. §1343(4).

Section 1343(4) is a grant to the district courts of original jurisdiction in any civil action "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights...." Section 1343(4) is not broad enough to cover a charge of direct violation of the 14th Amendment since the section is limited to civil actions arising "under any Act of Congress." But since we hold that the County is amenable to suit in a §1981 action, §1343(4) would give us jurisdiction and without respect to the amount in controversy. Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974); Campbell v. Gadsen County District School Board, 534 F.2d 650 (5th Cir. 1976).

(20) See also the summary affirmance by the Supreme Court in Lefkowitz v. C.D.R. Enterprises, Ltd., ___ U.S. ___ (Jan. 10, 1977), aff'g C.D.R. Enterprises, Ltd. v. Board of Education for the City of New York, 412 F.Supp. 1164 (E.D.N.Y. 1976) (three-judge).

it has been said that the amount in controversy is the value of the right to be protected. 1 Moore's Federal Practice §0.96[31-1] at 939.(18)

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(18) We are mindful that some courts have in effect ignored the $10,000 jurisdictional requisite in cases involving claims of violation of constitutional rights. These courts seem to hold that constitutional rights are so precious that, by definition, they are in every case worth more than $10,000. See e.g. Spock v. David, 469 F.2d 1047 (3d Cir. 1972), reargued, 502 F.2d 953 (3d Cir. 1974), reversed on other grounds sub nom, Grier v. Spock, 424 U.S. 828 (1976); CCCO-Western Region v. Fellows, 359 F. Supp. 644 (N.D. Cal. 1972); West End Neighborhood Corp. v. Stars, 312 F.Supp. 1066 (D.D.C. 1970). This view apparently stems from the separate opinion of Mr. Justice Stone in Hague v. C.I.O., 307 U.S. 496, 529 (1939). There is substantial contra authority. See e.g. Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir.), cert. denied, 400 U.S. 960 (1970); Ciancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), cert. denied, 379 U.S. 1001 (1965). In the absence of any decision on the point from our Circuit, we decline to follow the cases first-above cited which find the amount in controversy invariably present because constitutional rights are not capable of valuation in monetary terms. For a full discussion of the entire problem, see the footnote in Gomez v. Wilson, 477 F.2d 411, 420 n.56 (D.C. Cir. 1973).

Sugarman v. Dougall, 413 U.S. 634 (1973) the Court struck down a provision of the New York Civil Service Law which required citizenship for appointment to any position in the state's classified civil service. There were four named plaintiffs, all permanent legal resident aliens, who sued for themselves and for a class. Two of the plaintiffs were clerk-typists, one was a human resources technician, and the fourth an administrative assistant.

The Court's opinion emphasized the over-broad and indiscriminate nature of the statute, i.e. that the class of positions for which citizenship was required "reached...positions in nearly the full range of work tasks, ... all the way from the menial to the policy making." Id. at 640. The opinion noted that citizenship was not required for the unclassified civil service within which many of the higher policy making decisions were included. The Court categorically rejected the claim that a state can confine public jobs, paid for by public resources,

to citizens of the country. While observing that each state had the power to prescribe the qualifications of voters, elective office holders and holders of "important nonelective executive, legislative and judicial positions ...[and] officers who participated directly in the formulation, execution, or review of broad public policy...," the Court emphasized that such a statute must be "narrowly confined." Id. at 647. In a provocative and much discussed passage the Court said:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.' Dunn v. Blumstein, 405 U.S. 330, 344 (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." Id. at 642-43.

In re Griffiths, 413 U.S. 717 (1973), decided the same day as Sugarman, struck down a rule of the Connecticut court system requiring citizenship as a prerequisite for admission to the bar. Plaintiff was a long-time resident of the United States who was married to an American citizen and thus apparently entitled to remain here indefinitely. The Court rejected the argument that the special role of the lawyer within the governmental system justified excluding aliens from the practice of law. Although a Connecticut lawyer is denominated as a "commissioner" of the Superior Court with the right to sign writs and subpoenas, acknowledge deeds, administer oaths, take depositions and command the assistance of sheriffs and constables in the exercise of his authority, the Court stressed that these duties did not involve matters of such high policy or responsibility as would authorize a state to entrust them only to citizens. As in Sugarman, the Court stressed the duties imposed on resident aliens, which in-

clude the same obligation to pay taxes, and serve in the Armed Forces as are imposed on citizens. It observed that while lawyers (and other state employees) are required to take an oath to support the Federal and State Constitutions, such oath is customarily administered to resident aliens inducted into the Armed Forces and is thus deemed to be consistent with citizenship in a foreign country. The Court concluded that Connecticut had failed to establish any compelling state interest in confining law practice to citizens.

In Examining Board of Engineers v. De Otero, ___U.S. ___ , ___S.Ct. ___, 44 U.S.L.W. 4891 (June 17, 1976), the Court struck down a statute of Puerto Rico restricting the issuance of licenses for the practice of civil engineering in the private sector, to U.S. citizens. Puerto Rico was held to be "territory" within the ambit of federal civil rights and jurisdictional statutes. Among the justifications advanced by Puerto Rico for requiring citizenship

was the claim that citizen engineers are more likely to be present in the community and to be financially more accountable than noncitizens, a matter of significance since engineers may be liable for malpractice for ten years under local law. Another justification offered was that by confining the privilege of practicing engineering to citizens, Puerto Rico could prevent the uncontrolled influx of Spanish-speaking aliens into this professional field. A third justification offered was to raise the prevailing low standard of living. The Court held that these justifications, like those of New York in Sugarman and Connecticut in Griffiths, were inadequate.(21)

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(21) In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Supreme Court held unconstitutional a Civil Service Commission regulation requiring citizenship for practically all federal civil service positions. The holding that the Civil Service Commission was without power to exclude noncitizens from such a wide range of positions is a relatively narrow one. The Court said that such power, if it exists at all, belongs only to Congress and held that the exercise of such power by the Commission violated due process. The opinion contains interesting

From these opinions of the Supreme Court we can abstract the rules of law which we must apply in judging the California statute in question here. First, the equal protection guarantee as embodied in the 14th Amendment extends to permanent resident aliens. Second, a state statute or regulation classifying citizens and noncitizens and attaching disabilities to noncitizenship, involves a "suspect classification." Third, any "suspect classification" is subject to strict judicial scrutiny; for the statute to survive the state must establish (1) that the suspect classification [alienage] serves a compelling state interest, (2) that the classification is reasonably necessary to promote that compelling state interest, and (3)

(fn. 21 cont'd) language which hints that Congressional, or even Presidential, action requiring citizenship as a prerequisite for federal government employment and justified as an inducement for immigrants to become citizens, might be valid. This inducement to citizenship justification has not been dealt with in any prior opinion of the Supreme Court or in any prior judicial opinion cited to us. It was not advanced in the instant case.

Where a case involves denial of employment or dismissal from employment, courts have held that the amount in controversy may be met by considering the value of the job in question, i.e. the amount of money which plaintiff would earn in the job for the indefinite future or for the rest of his work expectancy. Friedman v. International Association of Machinists, 220 F.2d 808, 810 (D.C. Cir. 1955); Hiss v. Hampton, 338 F.Supp. 1141, 1146 (D.D.C. 1972); White v. Bloomberg, 345 F.Supp. 133, 141 (D.Md. 1972). We adopt that rule and under it, the case of each plaintiff amply meets the $10,000 amount in controversy requirement. The value of the position of Deputy Probation Officer II, which is the "object to be gained" by the complaint, exceeds $10,000.

Since we have found that a claim is stated against the County under both the 14th Amendment and §1981 which is cognizable in a district court, and that the jurisdictional amount in controversy exists, we find jurisdiction against

that the statute be narrowly and precisely drawn so as to avoid a classification that "sweeps too broadly."

We now proceed to measure the California statute, which is the subject of the instant case, against these criteria.

In relevant part, California Government Code §1031(a) provides:

> "In any instance in which ...members of a class of public officers or employees are...declared to be peace officers or to have the powers of peace officers, each member of such class must meet at least the following minimum standards:
> (a) Be a citizen of the United States." (Emphasis added)

California Penal Code §830 and various subsections thereunder provide a very long list of occupations and positions classified as peace officers or having the powers thereof. Deputy probation officers are included. The footnote(22) contains the entire list which

(22) Under §830.1
sheriff
undersheriff
deputy sheriff
policeman
marshal
deputy marshal
constable
deputy constable

Under §830.2
highway patrolman
members of the California State Police Division
members of the California National Guard when called into active service by the Governor
members of the University of California police department
members of a state college police department

Under §830.3
officers and special agents of the Department of Justice, Bureau of Criminal Identification and Investigation
officers and agents of the Bureau of Narcotic Enforcement
investigators in the office of a district attorney
the Director and enforcement officers of the Department of Alcoholic Beverage Control
officers and investigators of the Division of Investigation of the Department of Consumer Affairs
investigators of the Board of Medical Quality Assurance
members and deputies of the Wildlife Protection Branch, Department of Fish and Game
county fish and game wardens

(fn. 22 cont'd)

State Forester and employees of the Division of Forestry
voluntary fire wardens
officers and manager of compliance services of the Department of Motor Vehicles
investigators of the Department of Motor Vehicles
Secretary and Chief Investigator of the California Horse Racing Board
racetrack investigators of the California Horse Racing Board
police officers of a regional park district
state fire marshal, and deputy fire marshals
members of an arson-investigating unit of a fire department
members of a fire department of a local agency
inspectors of the Bureau of Food and Drug
park rangers
members of a community college police department
investigators of the Division of Labor Law Enforcement

Under §830.4
security officers of the California State Police Division
Sergeant at Arms of each house of the Legislature
Bailiffs of the Supreme Court and the court of appeals
guards and messengers of the State Treasurer's Office
director and employees of the Department of Navigation and Ocean Development

(fn. 22 cont'd)

the administrator of a state hospital and police officers designated by him
railroad or steamboat company policemen commissioned by the Governor
sextons and superintendents of cemeteries
other cemetery personnel designated by a cemetery authority (See Health and Safety Code §8325)
harbor policemen
special officers of the Department of Airports of the City of Los Angeles
the chief of toll services of the Department of Transportation and his captains, lieutenants and sergeants employed on vehicular crossings
members of a security patrol of a school district
authorized federal employees engaged in enforcing applicable state or local laws on federal property
Los Angeles County security guards
airport policemen designated by the Monterey Peninsula Airport District
airport security officers at airports operated by San Francisco, Orange or San Joaquin Counties
housing authority patrol officers employed by the housing authorities of Los Angeles or Contra Costa Counties

Under §830.5

parole officers of the Department of Corrections
placement or parole officers of of the Youth Authority

(fn. 22 cont'd)

probation officers
deputy probation officers
warden, superintendent, supervisor or guards employed by the Department of Corrections
any employee having custody of a ward in an institution of the Youth Authority
transportation officers of the Youth Authority

Under §830.5a

agents of the law liaison unit of the Department of Corrections

Under §830.6

persons deputized or appointed as a reserve or auxiliary sheriff, deputy sheriff or city policeman

In addition to the above, the following have the powers of peace officers:

Any person summoned to the aid of any uniformed police officer as in a posse comitatus (Penal Code §830.6b)
the director, officers and employees of the Division of Aeronautics (Pub. Util. Code §21252)
any person vested with the power of enforcing any provisions of the Agriculture Code (Agric. Code §7)
county fire wardens and assistant and deputy fire wardens (Government Code §24008)

ranges all the way from important law enforcement positions to positions having apparently insignificant and menial duties. Included in the latter group are sextons and superintendents of a cemetery authority and other cemetery employees, inspectors of the Bureau of Furniture and Bedding Inspection, sealers of the Department of Weights and Measures and messengers of the State Treasurer's Office.

The only justification advanced by defendants in this case as a compelling state interest is the one described in Sugarman, the State's power to define its "political community." We read the references in Sugarman to the "political community" for which the State may prescribe citizenship as a requisite of office, as being confined to high policy making officers. When confronted with this reading, defendants argue that the California statute in issue is applicable to only a "few" positions which are either "high level" or require "demanding discretional decisions in

(fn. 22 cont'd)

inspectors of the Board of Dental Examiners (Business and Professions Code §1704)
inspectors of the Bureau of Furniture and Bedding Inspection (Business and Professions Code §19206)
inspectors of the Bureau of Livestock Identification (Agric. Code §20432)
mental health counselors (Welfare and Institutions Code §6778)
officers and employees of the state park system (Business Resources Code §5003)
sealers of the Department of Weights and Measures (Business and Professions Code §12013)

their everyday execution." We cannot agree with the defendants. It is obvious from the long list of covered positions contained in the footnote that the statute is much broader than they claim and covers many positions with much less responsible duties than they describe. The claimed "political community" justification in this case, therefore, does not support this statute any more than it supported the requirement of citizenship for the classified civil service in New York State in Sugarman.

But even if we assume arguendo that the California statute serves a compelling state interest and employs a classification reasonably necessary to promote that compelling state interest, we would have to strike it down on the ground that it is not narrowly and precisely drawn and that it "sweeps too broadly."(23)

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(23) In various constitutional and statutory provisions, California requires citizenship as a qualification for holding statewide elective office including Governor and Lieuten-

Although the concept was not discussed in the briefs, at the argument of the case, the court and counsel discussed whether the validity of §1031(a) should be considered as applied, i.e. as limited to the position of deputy probation officer which is the position sought by all three plaintiffs.

The prior decisions of the Supreme Court dealing with alienage, which we have discussed above, would appear to rule out consideration of the validity of this statute as applied. Those decisions stress that the scrutiny which should be afforded to such a statute must include an examination of whether it is too broad in its sweep, overinclusive. That is why we, as the Court did in Sugarman, have examined all the types of positions for which citizenship is required. But we are also aware that in other

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(fn. 23 cont'd) ant Governor and for holding certain top executive positions in state government. See e.g. Cal. Const. art. 5, §§2 and 9 and Government Code §§241, 1001 and 1020. We express no view as to the validity of those provisions; they are not in issue here.

contexts, the Supreme Court has resorted to the "as applied" technique for the announced purpose of avoiding advisory opinions and unnecessary constitutional adjudication, especially where the outer parameters of a state statute are cloudy and unadjudicated. See, e.g., United States v. Raines, 362 U.S. 17, 20-22 (1960). So, out of an abundance of caution, we proceed to examine §1031(a) as applied.

The evidence before us contains no description of the duties performed by a deputy probation officer in California. However, counsel stipulated at the argument that we may take judicial notice of those duties based on our experience as judges. It is fortunate that all three members of this court had extensive experience as state court judges in California before appointment to the federal bench.

Deputy probation officers in California perform a wide range of duties. They include preparation of presentence investigations and recommendations as to sentence, supervision of

probationers (including efforts to ameliorate their employment, health and family problems) and investigation of probation violations. Also included are various duties in connection with juveniles and juvenile courts among which are the filing of juvenile court petitions charging both delinquency and illegal acts, presence at juvenile court hearings in an advisory capacity, placement of minors declared to be wards of the juvenile court and supervising custodial personnel in juvenile incarceration institutions. Important as those duties are, we cannot characterize a deputy probation officer as an employee who participates "directly in the formulation, execution or review of broad public policy...." Sugarman, supra at 649. Since a compelling state interest appears only when the requirement of citizenship is confined to positions of that type, the statute must be condemned even as applied. As in Griffiths, we would find that the duties of a deputy probation officer "hardly involve mat-

ters of state policy or acts of such unique responsibility as to entrust them only to citizens." 413 U.S. at 724. A similar approach has recently been taken in a well-reasoned opinion of a three-judge district court striking down a New York statute requiring public school teachers to be citizens. Norwick v. Nyquist, 417 F.Supp. 913 (S.D.N.Y. 1976). If neither lawyers nor teachers can be required to be citizens, it would seem to us an a fortiori proposition that citizenship cannot be required for deputy probation officers.(24)

Having held that §1031(a) violates the equal protection clause of the 14th Amendment, it follows that the denial of employment to the

(24) Our opinion, in striking down §1031(a) on its face and as applied, should not be read as holding that California could not constitutionally enact a citizenship requirement for a narrowly confined class of the most important peace officers. We do not decide, for example, whether county sheriffs or city police chiefs are within the state's "political community" or whether a citizenship requirement for them would be reasonably necessary to promote such a compelling state interest.

plaintiffs pursuant to §1031(a) involves a violation of 42 U.S.C. §1981 by the County and a violation of 42 U.S.C. §1983 by the individual defendants. The County has denied to these plaintiffs the "same right...to make and enforce contracts..." as are enjoyed by citizens (§1981). The individual defendants have denied these plaintiffs "under color of [a State] statute...[the] rights, privileges, or immunities secured by the Constitution...." (§1983).

Our decision herein should come as no shock or surprise either to the defendants in the instant case or to other California officials. Since no California court has passed upon the constitutionality of Government Code §1031(a) up to this time, the officials of Los Angeles County have apparently felt constrained to observe its requirements. But the California Attorney General seven years ago declared it to be unconstitutional.(25) His opinion ap-

(25) 53 Cal. Atty. Gen. Opin. 63 (1970).

pears correctly to have anticipated the Supreme Court's Sugarman decision. Additionally, the California Supreme Court in 1969 struck down a statute prohibiting the employment of aliens on public works[26] and, even before the Supreme Court spoke in Griffiths, invalidated a citizenship requirement for the practice of law.[27] And the California legislature, in 1970, repealed a blanket statute which required that every employee of the state and every county or city therein must be a citizen.[28] So the direction of the tide has been clear. One need not have qualified as a soothsayer to have predicted our present holding.[29]

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(26) Purdy & Fitzpatrick v. State, 71 Cal. 2d 566 (1969) (invalidating Labor Code §1850).

(27) Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288 (1972).

(28) See Historical Note preceding California Labor Code §1960.

(29) It would have been preferable, in the interests of harmonious federal-state relationships, for plaintiffs to have sought relief in the state courts instead of mounting their initial challenge in the federal courts. In the

Since we have declared §1031(a) to be unconstitutional because it discriminates illegally on the basis of alienage the claims of plaintiffs involving the right to travel and intrusion on Congress' immigration powers are rendered moot. We decline to discuss or decide those claims.

IV

RELIEF

If the statute is declared unconstitutional, defendants do not appear to dispute the specific relief sought by the various plaintiffs except as to damages and attorneys fees.

All three plaintiffs seek a declaratory judgment that Government Code §1031(a) is unconstitutional and an injunction preventing its enforcement against them. Such declaratory

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(fn. 29 cont'd) lights of the above-mentioned California decisions and Attorney General's opinion, it appears that a 14th Amendment challenge in the state courts might well have succeeded. However, in our view, plaintiffs' bypass of state court remedies, for whatever reason, does not warrant abstention on our part.

judgment and injunction shall issue. The judgment will run against all defendants and will bind the successors in office of the individual defendants.

As to Plaintiff Chavez-Salido, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer II-Spanish Speaking, with seniority rights retroactive to September, 1975. As to Plaintiff Ybarra, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer I with seniority benefits retroactive to January, 1976. The judgment will further order his restoration to the eligibility list for Deputy Probation Officer II-Spanish Speaking, retroactive to November, 1975.

As to Plaintiff Bohorquez, the judgment will contain an order directing defendants to invalidate the results of the examination for Deputy Probation Officer II-Spanish Speaking, which he took in May, 1975 and requiring them immediately to give him another test. Should

Bohorquez pass the new test, the judgment will order him restored to the eligibility list for that position retroactive to May, 1975.

We pass now to the issue of damages. Plaintiffs have formally renounced any intention to seek a damage award against any individual defendant.(30) Thus the court is not required to consider certain difficult questions of governmental employee immunity which would arise if money damages were sought against the individuals.

However, plaintiffs do press their claim for money damages against the County. It is settled that a county is not clothed with the immurity from money damage awards enjoyed by a state under the 11th Amendment, unless the county's damage obligation would be paid out of the state treasury. Edelman v. Jordan, 415 U.S.

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(30) See the stipulation of counsel filed Jan. 13, 1976 which renounces both damages and attorneys fees as against the individual defendants.

651 (1974). The County makes no showing that if damages are awarded against it, they must be paid from state funds. Thus, the County is not immune. But whether damages should be awarded against the County under the facts of this case is a matter that we, as a three-judge court, decline to decide at this point.

The parties have neither briefed nor argued for us a number of questions related to a possible damage award against the County. These include (1) whether damages are compelled or discretionary, (2) if discretionary, what factors should be considered in exercising that discretion, and (3) the measure of damages, including whether there should be an offset by way of mitigation for sums earned in other employment. We therefore refer the matter of damages to the single judge to whom the case was originally assigned for further consideration by him. He will have authority to enter any further judgment on the issue which he deems appropriate. One difficult question to be con-

sidered by the single judge is whether damages should be awarded at all where the act complained of as being illegal was the County's observance of the clear and unequivocal mandate of a state statute which had not been declared unconstitutional by any court.

The plaintiffs also seek attorneys fees, but only against the County. At the time of the filing of this action and its trial, it appeared that attorneys fees were not awardable in civil rights damage actions except where specific authority to award them was contained in the applicable statute. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). And, there was no specific statutory authority for fees which applied to our case. However, after the argument, a new statute on the subject became effective which authorizes discretionary awards of attorneys fees to the prevailing party in certain civil rights matters. The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. No. 94-559.

The new Act is not expressly applicable to cases pending on the date of its enactment, but a recent action of the Supreme Court indicates that it may well be,(31) and a recent district court decision so holds.(32)

It is therefore appropriate for us also to refer the attorneys fees question to the single judge to whom the case was originally assigned, with authority to decide it.

This opinion will constitute this court's findings of fact and conclusions of law as to the issues herein decided and the partial judgment herein ordered. Counsel for plaintiffs will prepare and submit a partial judgment within ten days. Defense counsel, if the proposed partial judgment is not approved by him as to form, will have ten days further in which

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(31) See the summary disposition in Stanton v. Bond, ____U.S.____ , 45 U.S.L.W. 3399 (Nov. 30, 1976).

(32) Wade v. Mississippi Cooperative Extension Service, ____U.S.____ F.Supp., 45 U.S.L.W. 2301 (N.D. Miss. Dec. 12, 1976).

to file written objections which will not change the result. The single district judge to whom the case was assigned, after deciding the unresolved questions referred to him herein, may sign and file a final judgment in the case.

DATED: February 3, 1977

/s/ STANLEY N. BARNES
STANLEY N. BARNES
Senior Circuit Judge

/s/JESSE W. CURTIS
JESSE W. CURTIS
Senior Circuit Judge

/s/IRVING HILL
IRVING HILL
District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
The Statutes Involved	2
Question Presented	3
Statement of the Case	3
Summary of Argument	4
ARGUMENT—	
I. Introduction	6
II. The Compelling State Interest Test is the Appropriate Test	9
A. Statement of the Test	9
B. The Position of State Trooper Is Not One Which Warrants a Less Strict Scrutiny	10
C. The State's Determination Cannot Be Justified By Any Rational Basis Which May Be Conceived	16
III. New York's Statutory Exclusion of Aliens Cannot Be Sustained Under Any Standard of Review	18
A. The Arguments Advanced By the State Bear No Rational Relationship to the Ends Asserted	19

PAGE

1. Knowledge and familiarity with the law 19
2. Personal Commitment to the Laws 20
3. Divided loyalties 23
4. Commitment to community 25
5. Alien images 27
6. Absence of any conceivable basis 28

B. The Exclusion of Aliens From the State Police Actually Impairs the Effectiveness of That Force and the Stability of the Community 29

C. New York Statutory Exclusion of Aliens Is Not "Precisely Drawn" In Light of Its Acknowledged Purpose 30

D. The Ends Sought by the State May be Achieved by Constitutionally Permissible Means 32

Conclusion 33

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Cases:

Apodaca v. *Oregon*, 406 U.S. 404 (1972) 14
Application of Park, 484 P.2d 680 (Alaska 1971) 20

Bushell's Case, 124 Eng. Rep. 1006 (1670) 14

Chavez-Salido v. *Cabell*, 427 F. Supp 158 (C.D. Cal. 1977) 11, 31, 32
Crane v. *New York*, 239 U.S. 195 (1915) 28

PAGE

Duncan v. *Louisiana*, 391 U.S. 145 (1968) 14
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Examining Board of Engineers v. *de Otero*, 426 U.S. 572 (1976) 8

Foley v. *Connelie*, 419 F. Supp. 889 (S.D.N.Y. 1976) 9, 23

Graham v. *Richardson* and *Sailer* v. *Leger*, 403 U.S. 365 (1971) 8, 9, 10, 11, 15
In re Griffiths, 413 U.S. 717 (1973) 3, 5, 8, 10, 13, 15, 19, 21, 22, 23, 24, 25, 27, 30

Hague v. *C.I.O.*, 307 U.S. 496 (1939) 32n
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Herriott v. *City of Seattle*, 81 Wash. 2d 48, 500 P.2d 101 (1971) 25, 26, 33
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 24
Hurd v. *Hodge*, 334 U.S. 24 (1948) 7

Jimenez v. *Weinberger*, 417 U.S. 628 (1974) 17

Keenan v. *Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970) (three-judge court) 20

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Levy v. *Louisiana*, 391 U.S. 68 (1968) 17

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PAGE

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Rizzo v. *Goode*, 423 U.S. 362 (1976) 32n

Shelton v. *Tucker*, 364 U.S. 479 (1960) 19, 32
Sugarman v. *Dougall* 413 U.S. 634 (1973) 3, 5, 8, 10, 11, 15, 16, 18, 19, 24, 27, 28, 30, 31, 32
Swain v. *Alabama*, 380 U.S. 202 (1965) 16

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Truax v. *Raich*, 239 U.S. 33 (1915) 7, 29

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California Government Code §1031(a) 31
Civil Rights Act of 1866, 14 Stat. 27 6
Civil Rights Act of 1870, 16 Stat. 144 6
Federal Rules of Criminal Procedure, Rule 24 16

PAGE

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9A New York Code Rules and Regulations § 478.7 12
New York Executive Law § 215 (1), (2) (McKinney 1972) 12
New York Executive Law § 215(3) (McKinney 1972) 2, 3, 4, 12, 26, 30, 31, 32
New York Judiciary Law §§ 504, 596, 662 (McKinney 1975) 15
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U.S. Const., Amends. VI, VII 14
U.S. Const., Amend. XIV, § 2 ..... 2, 6

United States Code

8 U.S.C. § 1182(a)(27)-(29) 24
8 U.S.C. § 1427(a)(1) 17n, 26
28 U.S.C. § 1253 2
28 U.S.C. § 1343(3) 2
28 U.S.C. § 2201 2
28 U.S.C. § 2202 2
28 U.S.C. § 2281 2
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PAGE

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IN THE

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OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

Opinion Below

The majority and dissenting opinions of the United States District Court are reported at 419 F. Supp. 889 (1976). (A copy is attached as Appendix A to the jurisdictional statement previously filed with this Court.)

Jurisdiction

Appellant's cause of action is based upon 42 U.S.C. § 1983. Appellant sought an order declaring the New York Executive Law § 215(3) prohibition of employing aliens with the New York State Police to be unconstitutional and enjoining its enforcement. The District Court had jurisdiction under 28 U.S.C. § 1343(3). Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202, and the three-judge court, convened under 28 U.S.C. §§ 2281 and 2284, is authorized to grant the injunctive relief sought by Appellant.

The judgment and order of the three-judge court was entered on September 1, 1976. A notice of appeal was filed on October 22, 1976. The jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. § 1253.

The Statutes Involved

The statutes involved in this suit are: New York Executive Law § 215(3), which provides in relevant part:

> No person shall be appointed to the New York state police force unless he shall be a citizen of the United States . . . New York Executive Law § 215(3) (McKinney Supp. 1975-76), and

The Fourteenth Amendment to the United States Constitution which provides in relevant part:

> . . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. 14.

Question Presented

Does the blanket exclusion of resident aliens from employment with the New York State Police deprive these persons of the equal protection of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

Appellant Edmund Foley is a citizen of the Republic of Ireland and an alien lawfully admitted for permanent residence in the United States. The Appellant has been a resident of the United States and the state of New York since February, 1973.

The Appellant filed an application for employment with the New York State Police in August, 1975. Shortly thereafter he received a letter from the State Police saying that his application was being rejected because he was not a citizen of the United States. Thereupon, the Appellant, through his attorney, wrote to the New York State Police, expressing his view that the decisions of this Court in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), and *In re Griffiths*, 413 U.S. 717 (1973), prohibited New York State from discriminating against aliens in civil service employment, and suggesting that the New York State Police reverse their policy of discriminating against aliens. The State Police, relying on New York Executive Law § 215(3), declined to do so, and this action was commenced.

On September 19, 1975, the Honorable Milton Pollack entered an order permitting the Appellant to take the competitive examination for State Trooper to be held September 20, 1975, and to otherwise pursue his application for that position as if he were a citizen, subject to

the proviso that no rights would attach to the plaintiff should the defendants ultimately prevail on the merits. The parties subsequently stipulated that the action proceed as a class action and that a three-judge court be convened. On December 30, 1975, Judge Pollack entered an order certifying the Appellant as the representative of a class consisting of all permanent resident aliens who, but for the enforcement of New York Executive Law § 215(3), would otherwise be eligible to compete for employment in the competitive class for State Trooper, and requiring the convening of a three-judge court. The case was argued on April 15, 1976, and decision upholding the constitutionality of § 215(3) of the New York Executive Law was handed down in July, 1976, with the Honorable Walter R. Mansfield, United States Circuit Judge dissenting in a separate opinion. An order denying Appellant's motion for summary judgment was entered on September 1, 1976. The same order continued the stipulation under which the Appellant's application is being treated as if he were a citizen, pending a timely appeal to this Court. (A copy of the judgment and order is attached as Appendix B to the jurisdictional statement previously filed with this Court.)

A notice of appeal to this Court was filed on October 22, 1976, and Appellant's jurisdictional statement was filed on December 20, 1976. This Court noted probable jurisdiction on March 28, 1977.

Summary of Argument

The law is settled beyond doubt that an alien is a person within the meaning of the Fourteenth Amendment. The law is also clear that the status of alienage is a suspect classification and that a state seeking to use such a classification bears a heavy burden of justification. New York has not met that burden in this case to support their exclusion of non-citizens from the whole of New York State Police Force.

The District Court erroneously determined that the position of state trooper was one so close to the heart of representative government that the state's use of the alienage classification could be justified by a lesser showing. The exercise of discretion by individual state troopers does not anywhere near approach the high plane of policy-making envisioned by this Court when it suggested in *Sugarman* v. *Dougall*, *supra*, that a less strict standard of review might be appropriate. Regardless of the test applied, it is clear that the status of alienage bears not even a rational relationship to the achievement of the goals sought by the State. Thus the necessary connection between the use of the suspect classification and a compelling state interest has not been established. Furthermore, the classification employed by the state is overly broad. The means employed by the state do not necessarily achieve the ends proffered as justification. Furthermore, the state has constitutionally permissible means of achieving those ends.

The history of the Fourteenth Amendment establishes that it was designed, in part, to protect aliens from discrimination. This Court's history of interpretations gave concrete meaning to this constitutional command. These decisions came to recent fruition in *Sugarman* v. *Dougall* and in *In re Griffiths* which held that a state could not exclude aliens from public employment or the practice of law. Edmond Foley wants the public position of enforcing the law. The Court's decisions in these two cases, in particular, both singly and combined, guarantee him the constitutional right to do so.

It is significant to note that every other court that has considered this issue has reached a conclusion directly opposed to that reached by the majority court below. Circuit Judge Mansfield's dissent eloquently refuted the majority's argument and justifications for discrimination. The decision of the district court is thus clearly erroneous and should therefore be reversed.

ARGUMENT

I.

Introduction.

The Fourteenth Amendment of the United States Constitution reads in pertinent part that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 2 (emphasis added). This Amendment originated as a joint resolution of Congress. When presenting it to the House on behalf of the Committee on Reconstruction, Mr. Howard of Michigan emphasized its broad reach:

> The last two clauses of the first section of the Amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty or property without due process of law, or from denying to him the equal protection of the law. Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

After the Amendment had been ratified by the States, Congress reenacted the Civil Rights Act of 1866, 14 Stat. 27, in order to carry out the broad command of that Amendment. Civil Rights Act of 1870, 16 Stat. 144. In so doing, it changed the language of § 1 of the 1866 Act, which applied only to "all persons born in the United States and not subject to any foreign power," to "all persons within the jurisdiction of the United States." *Id.* § 16. *See Hurd* v. *Hodge*, 334 U.S. 24, 30-32 and n.7 (1948).

It is thus clear that aliens were among the intended beneficiaries of the Fourteenth Amendment, and this Court has consistently so held since 1886. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

In *Yick Wo*, this Court struck down a San Francisco ordinance which had the effect of preventing Chinese from operating laundries. Although the Court's decision in that case firmly established that aliens were "persons" within the meaning of the Fourteenth Amendment, *id.* at 369, the next several decades did not see much advancement in the rights of aliens. Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, 1974 Duke L.J. 871, 873-74 [hereinafter *Employment Restrictions*]. The next important decision was *Truax* v. *Raich*, 239 U.S. 33 (1915), which struck down an Arizona statute restricting the employment of aliens in that state. In the course of the *Truax* opinion, Mr. Justice Hughes observed that the Fourteenth Amendment guaranteed the alien "the right to work for a living in the common occupations of the community." *Id.* at 41.

In *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948) the Court struck down a California statute restricting the right of certain resident aliens to fish in California waters. Noting that state imposed restrictions on the employment of aliens conflicted not only with the Fourteenth Amendment but also with the federal government's plenary powers over immigration and naturalization, the Court held that "the power of a state to apply its laws exclusively to its alien inhabitants [was] confined within narrow limits." *Id.* at 420.

In *Takahashi*, this Court enunciated the "general policy that all persons lawfully in this country shall abide 'in any

state' on an equality of legal privileges with all citizens under non-discriminatory laws." *Id.* Although the "policy" had been existent for over a century, it was not until the decision of this Court in the companion cases of *Graham* v. *Richardson* and *Sailer* v. *Leger*, 403 U.S. 365 (1971), that the full intentions of the framers of the Fourteenth Amendment reached the full dimensions of judicial application. In striking down durational residency and citizenship requirements for governmentally funded benefit programs, this Court held that:

> classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate.

Id. at 372 (footnotes omitted). The holding in *Graham* has since been reaffirmed by this Court several times. New York's statutory exclusion of aliens from all positions in the competitive civil service was invalidated, *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), and a Connecticut rule which prevented aliens from practicing law in that state was likewise struck down. *In re Griffiths*, 413 U.S. 717 (1973). Last term a Puerto Rico statute which restricted engineering licenses to citizens was struck down, *Examining Board of Engineers* v. *de Otero*, 426 U.S. 572 (1976). In recent years, almost every court that has considered the issue has found state regulations which discriminate against aliens in employment and employment opportunities invalid. For a collection of the cases, see Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 Fordham L.Rev. 835, 838-39 and nn. 31-32 (1977) [hereinafter *Aliens' Right to Work*]. Indeed, the case at bar has the distinction

of being the only one where a state imposed restriction on employment opportunities was upheld. *Id.*

There are sound policy reasons for this set of overwhelming precedents. As this Court noted in *Graham*, aliens, like citizens, pay taxes, serve in the armed forces, and may reside in a state for many years, work in the state, and contribute in myriad ways to the cultural and financial growth and well-being of the state. 403 U.S. at 376. Therefore, as the courts considering this situation conclude, "any classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis." *Rafaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 298, 496 P.2d 1264, 1271, 101 Cal. Rptr. 896, 903 (1972). The barriers erected by state legislatures against aliens violate this democracy's basic constitutional policy of awarding benefits on the basis of individual merit and imposing burdens according to individual wrongdoing. See Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 Geo. L.J. 1071, 1099 (1974). It is against this background that the unique decision in *Foley* v. *Connelie*, 419 F.Supp. 889 (S.D.N.Y. 1976) (three-judge court), must be considered and reversed.

II.

The Compelling State Interest Test is the Appropriate Test.

A. Statement of the Test

In order to justify its discrimination on the basis of alienage, the burden is on New York "to show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safe-

guarding of its interest." *In re Griffiths*, 413 U.S. at 721-22 (footnotes omitted). It is clear that in this case New York has not met its "heavy burden of justification." *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964).

The District Court found the substantial and compelling state interest to be "the maintenance of public order to effect the preservation of the political structure including the prevention, detection and prosecution of crime." 419 F.Supp. at 898, App. A 37-38. The Appellant challenges neither the substantiality nor the permissibility of this interest. However, the exclusion of all aliens from all positions within the State Police does not further this goal; indeed, the exclusion may well hamper the State in the achievement of its purpose. As is set forth in detail below, there are less restrictive, constitutionally permissible means available to the State which are better suited to the achievement of the asserted purpose.

B. The Position of State Trooper Is Not One Which Warrants a Less Strict Scrutiny

Graham v. *Richardson* and *In re Griffiths* establish that because alienage is a "suspect class," any state laws which discriminate on that basis must be subject to strict judicial scrutiny. In a general discussion of the subject in the *Sugarman* opinion, however, this Court suggested its scrutiny would be less strict when considering the power of a State to establish the qualifications for "persons holding state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution or review of *broad* public policy perform functions that go to the heart of representative government." 413 U.S. at 647 (emphasis added). The District Court concluded that the position of State Trooper falls within this language, 419 F. Supp. at

895, App. A 24, and therefore required only a rational basis for the discrimination (the Court did, without explanation, also find that the compelling interest test was met). *Id.*, App. A 24-A 25. We respectfully disagree. The class of positions to which this exception applies must clearly be a narrow one.

Discrimination against aliens, where justified, must be founded on the narrow basis of the state's power to establish the qualifications for persons who make high level policy decisions, *i.e.*, those persons who are within the "political community" of the state. A careful analysis of the decision-making function exercised by the vast majority of state policemen makes it clear that they do not fall within this class. *See Chavez-Salido* v. *Cabell*, 427 F. Supp. 158, 169-72 (C.D. Cal. 1977) (three-judge court); 419 F. Supp. at 900-02, App. A 47-54 (Mansfield, J., dissenting).

The nature of the *Sugarman* recognition of a legitimate state interest is based upon political functions. "Voting and legislating are paradigmatic examples of participation in a political community. . . ." *Id.* Executive officers who "inevitably and properly act 'politically,'" *id.* (App. A 50) are also included within the range of the *Sugarman* language. The justification for creating this narrow exception to the heavy burden borne by an invidiously discriminating state, *Graham* v. *Richardson*, 403 U.S. 365 (1971), is the inherent power of the state "to preserve the basic conception of a political community." *Dunn* v. *Blumstein*, 405 U.S. 330, 344 (1972). Basic policy choices are appropriately made by public officers, both elected and non-elected, and only in this narrow area may citizenship requirements bear upon qualifications for the position.

The New York State Police force affirms that it operates as "a para-military organization." Connelie Affidavit (App. D 24). It selects its members on the basis of competitive

examination. *Id.* (App. D 33); New York Executive Law § 215(3) (McKinney 1972). An applicant's "fitness and good moral character" is required to be shown, in addition to the physical and mental examination. *Id.* After admission, troopers are educated and trained by the State. New York provides for a state police academy, employs officers specifically assigned to training, and assigns a salary at the training rate for troopers. *Id.* § 215(1), (2) (McKinney 1972).

As a "semi-military organization," 9A N.Y.C.R.R. §478.7, the New York State Police is a military hierarchy with strict accountability to superiors and with the sanction of disciplinary action for failure to comply with orders, "rules, regulations or instructions." The control of individual troopers is exercised at all times. Prior rules and regulations detail policy and outline the responsibilities of officers. Superior officers exercise authority contemporaneous to the officer's activity, limiting its scope, and precluding too broad a leeway for individual discretion. Subsequent disciplinary procedures, or simple review of police actions also limit the power of the individual officers.

There well may be some "limited, interstitial policy making," but it does not, as Circuit Judge Mansfield emphasized, remotely approach the level where it may be considered to be at "the heart of representative government." 419 F. Supp. at 901, App. A 52.* The reality of the limited exercise of police discretion is neither a relevant, nor a

* Influential analyses of the nature of police discretion have emphasized the importance of recognizing its existence in order that it might be structured and controlled by recognized procedures. *See* American Bar Association Standards Relating to the Urban Police Function, Standards 4.2, 4.3 (1973); K. Davis, Police Discretion 98-103 (1975). No serious commentator has advocated broad discretionary authority residing in individual officers, since it would be antithetical to democratic philosophy and traditions.

sufficient basis for classifying a state trooper as "so close to the core of the political process as to make him formulator of government policy." *In re Griffith*, 413 U.S. 717, 729 (1973). In fact, detailed statements of government policy surround the police officer, in the form of penal statutes, judicial decisions, administrative regulations, and written as well as oral orders from superiors. Those areas in which some discretion is exercised are often social and familial, and state interests are not at all advanced by a broad disqualification of aliens. *See* Vandall, *Training to Meet the Police Function*, 1971 Wis. L. Rev. 547, 561-63. State troopers' decisions in these instances are personal decisions, not political ones. The troopers may treat crises within a narrow spectrum, but they are not engaged in prior decision-making. Their function is to react to situations, not to formulate policy. The officer's duties are circumscribed by articulated policy and enforced by paramilitary discipline. Their discretion when utilized involves the application of factual judgments, *not* political or policy judgments; they apply the law's requirements to their perceptual judgments. The discretion exercised is thus much less than that exercised by lawyers and other aliens in public employment and at a lower policy level. *See* Connelie Affidavit, ¶ 8, App. D 28.

The limitations on the activity of individual state troopers effectively preclude the application of the rationale of *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff'd* 426 U.S. 913 (1976). No more extreme contrast to the individual state trooper could be devised than the individual juror. The jury presents "perhaps the most secret form of decision-making in the nation." *Id.* at 138 As an element in our system of goverment, the jury is the prime example of a non-bureaucratic institution. It is temporary, not permanent. *See Aliens' Right to Work*, 45

Ford. L. Rev. at 844-45. There is no system of reward and punishment based upon performance of the task assigned. *See Bushell's Case*, 124 Eng. Rep. 1006 (1670). Relations within the jury are quintessentially democratic: jurors select their foreman, and reach decisions by unanimous or majority vote. *See Apodaca* v. *Oregon*, 406 U.S. 404 (1972). At least with criminal juries, their group decisions are autonomous, except of course that the trial judge may overturn verdicts of guilt.

The jury is a unique decision-maker, central to the United States form of government; it is specially enshrined in the Constitution. U.S. Const. Amends. VI, VII. It has always been considered at the heart of our system of government, "fundamental to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968). It may be conceded that there is a valid governmental interest "in assuring that those who make *the ultimate factual decisions* on issues of personal liberty and property rights under our system of justice be either native born or naturalized citizens." *Perkins* v. *Smith*, 370 F.Supp. 134, 136 (D. Md. 1974), *aff'd* 426 U.S. 913 (1976) (emphasis added). Given this Court's rulings on the rights of aliens, however, it is clear error for the District Court to extend the same reasoning to a completely different category of public employment. "[J]uries are the final arbiters of truth and consequently of justice." *Id.* at 137. State troopers are not, are not intended to be, and should not be "final arbiters of truth." Again, the importance of state police officers is of a completely different nature: it is not "ultimate," it is not "fundamental to the American scheme of justice," with the same constitutional, traditional and political heritage. *See* 1 A. de Tocqueville, *Democracy in America* (Reed tr. 1961 ed.).

Juries have definitionally broad discretion, which is relatively uncontrolled, and is unimpeachable. The secrecy

of jury action is a hallmark of the institution, maintained both to protect litigants, and to preserve unfettered decisionmaking within the jury.

State troopers' decisions in these instances are personal decisions, not political ones. The troopers may treat crises within a narrow spectrum, but they are not engaged in prior decisionmaking. Their function is to react to situations, not to formulate policy. This secrecy, the absence of accountability, and the possibility of a severe obstruction or distortion of justice by just a single juror led the Court of Appeals for the Fifth Circuit to accept the rationale of *Perkins* v. *Smith*. *United States* v. *Gordon-Nikkar*, 518 F.2d 972 (5th Cir. 1975). The Fifth Circuit held that the federal government was required to establish a compelling interest in order to justify confining the selection of jurors to citizens. *Id.* at 976. Federal authority to make the classifications was found to be more expansive than state authority. "Thus, while most *state* classifications based on aliens are inherently suspect, *Graham* v. *Richardson*, *In re Griffiths*, *Sugarman* v. *Dougall*, *Takahashi* v. *Fish and Game Comm'n*, *supra*, the same is not true of all such federal classifications where Congress' plenary authority in the field of immigration is involved." *Id.* at 977 (emphasis in original).

As Circuit Judge Mansfield pointed out in his dissent below, 419 F. Supp. at 904 n.3, jury selection procedures are both broader and more individualized than those for state troopers. New York Judiciary Law §§ 504, 596, 662 (McKinney 1975). Broad criteria of residence, age and mental ability supplement a citizenship requirement. Beyond these broad guidelines, selection of individual petit jurors is "expedited", and trial attorneys argue for exclusion for cause, *i.e.* based upon a finding that the juror would be unable to decide the case fairly, or challenge

peremptorily, for reasons which need not be articulated. *See* F.R. Crim. P., Rule 24; *Swain* v. *Alabama*, 380 U.S. 202 (1965). The nature of broader guidelines may be justified by the jury's functions and position in the system of justice. Selection of state troopers can be more selective, since it applies only to those who willingly request appointment, and because there must be individual judgments of fitness and character. At the same time, selection must be made on the basis of rational, defensible criteria, and cannot be the subject of an inarticulated prerogative such as the peremptory challenge.

C. The State's Discrimination Cannot Be Justified By Any Rational Basis Which May Be Conceived

Even if this Court concludes that the position of state trooper is one which involves so high a level of policy making that a lesser scrutiny is required, it does not follow that the exclusion of all aliens from that position is *ipso facto* constitutional. The *Sugarman* opinion explicitly recognized that such state action is still subject to judicial scrutiny, although under a standard less strict than the "compelling state interest" test. 413 U.S. at 648.

Under traditional equal protection analysis, if the "compelling state interest" test is inapplicable, the statute at issue must be tested under the "rational relationship" test. This test requires, at a minimum, that the statutory classification bear some rational relationship to a legitimate state purpose. In a recent discussion of the test, this Court noted that more might be required without reaching the "most exacting scrutiny" of the compelling state interest test:

> Though the latitude given the state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a 'stricter' scrutiny . . .

Trimble v. *Gordon*, —— U.S.——, 45 U.S.L.W. 4395, 4396 (Apr. 26, 1977), citing *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

Both *Trimble* and *Weber* dealt with classifications based on illegitimacy. Classifications based on illegitimacy, like those based on alienage, create constitutional problems because they grant or deny benefits on the basis of characteristics which have nothing to do with a particular individual's qualifications* for the benefit at issue. Thus, while refusing to label illegitimates a "suspect class," *Trimble* v. *Gordon*, 45 U.S.L.W. at 4396, this Court has nevertheless consistently struck down statutes which erected presumptions denying illegitimates the opportunity to establish the facts which would have entitled them to benefits. *See, e.g., Trimble* v. *Gordon, supra; Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *Levy* v. *Louisiana*, 391 U.S. 68 (1968). Laws such as the one here at issue, which conclusively deny all aliens the opportunity to participate in a significant aspect of governmental service, regardless of that alien's qualifications, contributions to the community and commitment to the public good, likewise ought not to be upheld, at least in the absence of a showing by the State of a factually demonstrable connection between the interests asserted by the State and the restrictions imposed. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 Geo. L. J. 1071, 1082 (1974).

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* A further analogy between aliens and illegitimates exists with regard to those permanent resident aliens, who, like Mr. Foley, have not been here long enough to qualify for naturalization, *see* 8 U.S.C. §1427(a)(1), and for whom the status of alienage, like the status of illegitimacy, is not a matter of personal choice.

New York's statutory exclusion of all aliens from all positions within the State Police force cannot survive this test, for as Judge Mansfield noted in his dissent below:

> There is not a shred of evidence in the record of this case to indicate, much less prove, that a properly tested, selected and trained resident alien would be less competent than a citizen to perform the duties of a New York state trooper, which admittedly are paramilitary in nature, or that members of the plaintiff class would present a poorer security risk or be less loyal to the State than citizens in the performance of those duties.

419 F.Supp. at 899, App. A42.

Indeed, New York has not even met its burdens under the mir num requirements of the rational relationship test, for, as we will now demonstrate, the statutory exclusion of all aliens from the State Police completely lacks a rational basis in logic or in fact, and the means employed by the State are not "precisely drawn in light of the acknowledged purpose." *Sugarman*, 413 U.S. at 643.

III.

New York's Statutory Exclusion of Aliens Cannot Be Sustained Under Any Standard of Review.

To avoid duplication of analysis under the possible tests, we address the arguments advanced by the District Court and the State of New York to justify the statutory exclusion of all aliens from the State Police in this one section. As will be shown, this statute cannot survive scrutiny under even the minimal requirements of the "rational relationship test." The exclusion of aliens in no way furthers the interests of the State supposedly at stake here under any of

the theories advanced in the court below. *A fortiori*, the necessary connection which stricter scrutiny requires between the exclusion and the protected interest has not been established. In fact the means chosen by the State to advance its interests actually may serve to defeat those interests. Further, the means chosen are not precisely drawn in light of the acknowledged purpose, *Sugarman* v. *Dougall*, 413 U.S. at 643, and, finally, there are constitutionally permissible less restrictive means available to the state which better serve the ends sought. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

A. The Arguments Advanced By the State Bear No Rational Relationship to the Ends Asserted

1. *Knowledge and familiarity with the law*

The District Court supported its conclusion with the observation that state troopers have the duty of preserving and protecting the constitutional rights of all persons within New York State and that this duty is largely exercised without supervision. 419 F.Supp. at 895, App. at A24. The District Court, without explaining why, then stated that "this is a situation where citizenship bears a vital and essential relationship to the proper performance of the duties of a state trooper." *Id.* The analogy to the legal profession would seem compelling here: certainly an attorney is required to be as familiar with constitutional rights and the applicable laws and regulations as is a state policeman, and it is fair to assume that the obligations in this regard with respect to an attorney are generally greater than those imposed upon policemen. Courts which have considered the issue have found no relationship between the fact of citizenship and an applicant's knowledge of local custom or law. *See, e.g., In Re Griffiths*, 413 U.S. 717, 725 (1973); *Rafaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 296, 496

P.2d 1264, 1270, 101 Cal. Rptr. 896, 902 (1972); *Application of Park*, 484 P.2d 690, 692 (Alaska 1971). See also Note, *Aliens' Right to Work: State and Federal Discrimination*, 45 Ford. L.R. 835, 844 and n. 74 (1977). In *Rafaelli, supra*, the California Supreme Court observed that "[k]nowledge of this type is acquired in many ways, both formal and informal. It comes not so much from the accident of birth as from the experience of the daily life of the community and the role of government in that life." 7 Cal. 3d at 296, 496 P.2d at 1270, 101 Cal. Rptr. at 902. And, in a related context, the late Judge Craven observed that:

> [N]either legal competence nor ethical fitness depends upon cultural provincialism. Assuming that knowledge of local government, a permanent stake in the community, and good character are desirable and important qualifications for the competent legal practitioner, we do not agree that one year's residence is in any way relevant to a determination that these qualities are present in a particular individual. Too often, even lifelong residents of a community have no knowledge of even the basic rudiments of the governmental units closest at hand. *Keenan* v. *Board of Law Examiners*, 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) (three-judge court) (footnote omitted).

2. *Personal Commitment to the Laws*

In an argument closely allied to that of the State's "loyalty" argument, the District Court also attempted to establish the requisite nexus between citizenship and the position of State Trooper by claiming that the state trooper's highly sensitive and delicate role requires that a person be "personally committed" to the proper application and enforcement of the laws. 419 F. Supp. at 897, App. at A29. But, for reasons such as those expressed

above, alienage does not affect one's ability to make that commitment. Certainly, the District Court cannot be relying on the long-discredited notion that aliens as a group are inherently more prone to commit crime than citizens. *Compare In re Ramirez*, 193 Cal. 633, 650, 226 P. 914, 921 (1924) *with Rafaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 298, 496, P.2d 1264, 1271, 101 Cal. Rptr. 896, 903 (1972). Furthermore, it is clear that alienage does not prevent a person from subscribing to an oath. In the *Griffiths* opinion, this Court explicitly rejected the contention "that only citizens can in good conscience take an oath to support the Constitution." 413 U.S. at 726 n. 18. The Court noted that all persons inducted into the armed services are required to take such an oath, citizen and alien alike, and thus saw no reason why an alien attorney could not subscribe in good faith to such an oath. *Id.* Similarly, an alien state trooper could make a good faith pledge of his personal commitment to uphold and to enforce the laws of the United States and of New York State.

The District Court proffered *United States* v. *Gordon-Nikkar*, 518 F.2d 972 (5th Cir. 1975) and *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md. 1974) (three-judge court), *aff'd* 426 U.S. 913 (1976), as purported authority. These cases, however, concerned the right of aliens to serve on grand and petit juries, which, as we demonstrate *supra*, is an entirely different situation, both in fact and in constitutional law.

The interests of the federal government in the personal commitment of its soldiers to its laws and ideals cannot be questioned, and is certainly at least as great as the interest of the State in the same commitment by its policemen. If the federal government can rely on such an oath, particularly from alien draftees who have no choice but to subscribe to it or to return to their native countries, the

State can certainly rely on it for those aliens who affirmatively demonstrated such a commitment by their act of seeking employment with the State Police.

As with *In re Griffiths*, 413 U.S. 717 (1973), the sole basis for disqualification in the instant case is appellant's status as a resident alien. *Id.* at 723. Here, as in *Griffiths*, "[i]t is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant [for admission to the Bar, or for appointment as a state trooper] possesses " 'the character and general fitness requisite for an attorney and counselor-at-law [or a state trooper].' " *Id.* at 722-23 (citations omitted). This Court held in *Griffiths* that a blanket exclusion of aliens is not a permissible means available to ease the state's responsibility in selecting its officers.

Without denigrating "a lawyer's high responsibilities," this Court in *Griffiths* invalidated the restriction based upon alienage alone. A wide variety of permissible methods may be used to determine fitness for state troopers, as for lawyers, as New York in fact does. State troopers are clearly not held to a higher duty, or are more intimately connected to the system of justice than are attorneys. No one can and, we trust, no one will suggest that state troopers are as advanced in the judicial and legal functions as lawyers, who as officers of the court are entrusted with semi-judicial operations, facilitating government and business operations, and informing tribunals.

Citizens arrest citizens; aliens can arrest aliens. Members of the same race arrest each other and can do so whether they are citizens or aliens. And aliens have no common "alien" interest or identity. The District Court erred, as Circuit Judge Mansfield pointed out, in upholding a blanket exclusion without "a shred of evidence in the

record" that non-citizen state troopers would be less competent or less loyal in the performance of their duties. 419 F. Supp. at 901 (Mansfield, J., dissenting); App. A 42.

One of the bases of Judge Winter's concurrence in the *Perkins* decision was that, although less drastic means were available to ensure proficiency in English and familiarity with laws and customs, there did not appear to be any guarantee of a juror's commitment to the upholding of the laws. Police experience far greater supervision in the performance of their duties than do jurors who are merely instructed. The affirmative act of applying for appointment as a trooper positively demonstrates acceptance of a pledge to uphold the law.* This pledge can be verified, and is verified for citizens, in a well-designed process of selection and training. See *Foley*, 419 F. Supp. at 904 n.3, App. A62 (Mansfield, J., dissenting). Unlike a juror's oath which is "virtually unenforceable," *Perkins* v. *Smith*, *supra*, 370 F. Supp. at 141 (Winters, J., concurring) state police officers are subject to prior examination, continuing supervision and subsequent review.

3. *Divided loyalties*

New York has sought to justify the exclusion of all aliens from its State Police force by speculating on the potential conflicts of loyalties which may arise for the alien State Trooper in the performance of his duties. Thus, the State argues that by the mere fact of his alienage, an alien can presumptively not be counted upon to protect foreign dignitaries at the 1980 Winter Olympics at Lake Placid, to assist in the arrest of aliens illegally in the country, or to investigate matters dealing with

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* The possibility of sabotage is so small that it cannot validate so broad an exclusion, and this danger can be eliminated by an individual determination. *In re Griffiths*, 413 U.S. at 726.

government security. 419 F. Supp. at 898, App. A36; Connelie Affidavit at ¶¶ 9-11, App. D28-30. This argument cannot withstand even a cursory analysis.

The federal government has seen fit to entrust its security to aliens as well as citizens. Permanent resident aliens of the United States not only have the opportunity to serve in the Armed Forces of this country, but they may be required to do so. *See* 50 U.S.C. App. §§ 453, 454(a); *Sugarman* v. *Dougall*, 413 U.S. at 645. The State may satisfy itself as to the loyalty of the alien to its constitution and laws by requiring him to subscribe to an oath. *In re Griffiths*, 413 U.S. at 726 n. 18. The argument of the State that the status of alienage creates a limbo of loyalty which the alien cannot overcome by personal choice is in square conflict with the holdings of this Court in *Sugarman* and *Griffiths* and must be rejected here. The personal commitment to the law of a person who is volunteering, by joining the Police Force, to put his life on the line for the sake of his adopted state, *see* Connelie Affidavit at ¶¶ 5, 9, App. D25-29, cannot be questioned by such arbitrary presumptions. Not only is such a presumption illogical, but it flies in the face of the contrary presumption created by the federal immigration laws. Those laws establish rigorous controls which prevent the admission into this country on any basis of any alien who might conceivably present a threat to this country or its institutions, 8 U.S.C. §§ 1182(a)(27)-(29), or who has at any time assisted or participated in any violation of the immigration laws. *Id.* (31). It is clear that the federal government possesses and exercises plenary power over immigration to the exclusion of similar exercises of control by the states. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

4. *Commitment to community*

The status of citizenship is, as this Court has often noted, irrelevant in determining a person's membership in or commitment to a community. "Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. at 722. As several courts have observed, the alien may have lived in the state for many years, "demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state." *Herriott* v. *City of Seattle*, 81 Wash. 2d 48, 60, 500 P.2d 101, 109 (1971); *Purdy & Fitzpatrick* v. *State*, 71 Cal. 2d 566, 582, 456 P.2d 645, 656, 79 Cal. Rptr. 77, 88 (1969). The citizen, on the other hand, may be a relative newcomer to the state who has little "stake" in the community, *id.*, and who may move on at a moment's notice.

An alien applicant may thus be more familiar with the laws and customs of the United States than the citizen applicant, may have resided in the state longer, made more of a contribution to it, and have demonstrated more of a commitment to it. An alien may take an oath to support the laws and constitutions of the United States and of the State in which he resides. *In re Griffiths*, 413 U.S. at 724 n. 8. Thus the difference between the naturalized citizen eligible for appointment and the alien who is ineligible could merely by the experience of participation in the formal ceremony which occurs in naturalization court. Note, *California Exclusion of Permanent Resident Aliens from Appointive Public Office*, 11 Cal. Western L. Rev. 117, 122 (1974). The differences between a citizen and an alien likewise have no bearing on commitment. A person born in the United States of foreign parents could spend twenty years overseas, and be

eligible for appointment. An alien could spend the same time growing up in the United States and be ineligible.

It is undisputed that the federal government has broad authority to set the terms and conditions of naturalization. U.S. Const., Art. I, § 8, cl. 4. Thus the federal government need not deem relevant for the purpose of naturalization aspects of an alien's background and community standing, and, therefore, "[t]he grounds employed by [nations] in making their characterizations of 'nationality'" may ignore or bear only incidental relationship to the facts of community membership. *See* McDougal, Laswell & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 Am. J. Int'l L. 432, 439 (1976). A state, on the other hand, may not stand in the shoes of the federal government in this regard. Mr. Foley has not yet been in the United States for five years, and is thus not yet eligible for naturalization.* 8 U.S.C. § 1427(a)(1) (1970). The conclusive presumption made by Executive Law § 215(3) that this fact makes Appellant insufficiently committed to the proper application of the law and the survival of the state reflects the utmost arbitrariness. McDougal, *et al.*, *supra*, 70 Am. J. Int'l L. at 439 n. 38. As the Supreme Courts of both Washington and California have observed, "any classification which treats all aliens as undeserving and all citizens of the United States as deserving rests upon a very questionable basis." *Rafaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 298, 496 P.2d 1264, 1271, 101 Cal. Rptr. 896, 903 (1972); *Herriott* v. *City of Seattle*, 81 Wash. 2d 48, 60, 500 P.2d 101, 109 (1971).

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* By the time Mr. Foley meets the five year residency requirement for naturalization, he will be too old to apply for the position of State Trooper.

Furthermore, it is clear after *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948), that a State may not rely on the distinctions made in federal immigration law to justify arbitrary discrimination. California had enacted a law precluding only those resident aliens ineligible for citizenship from fishing in California waters. In striking down the law as violative of equal protection, this Court made the following disposition.

> All of the foregoing [a discussion of the applicability of the Fourteenth Amendment and the Civil Rights Acts to aliens] emphasizes the tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants, and particularly certain racial and color groups within this class of inhabitants, from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization.

Id. at 420.

5. *Alien images*

New York further argues that it has a right to conduct its sovereign affairs through the agency of its citizens. Connelie Affidavit, ¶6, App. D 25-26. But see *In re Griffiths*, *supra*, for officers of the court conducting its affairs. If the issue is image, it is difficult to see how the person in contact with the State Trooper will be aware of the latter's citizenship, and it is even harder to see how this is crucial to the preservation of the political structure. The argument is little more than a variation on the "special public interest" doctrine explicitly rejected in *Sugarman*, 413 U.S. at 644-45. It is thus a patently insufficient justification for the employment of a suspect classification.

6. *Absence of any conceivable basis*

Finally, it is worth noting in passing, that the State has never attempted any showing of what actually motivated the legislature to include the citizenship requirement when it enacted what is now Executive Law §215(3) in 1927. The law was enacted at a time when the states generally were enacting laws which discriminated against aliens, Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 Hastings Const. L.Q. 1029, 1036-46 (1975); *Employment Restrictions*, *supra*, 1974 Duke L.J. at 871-76, and when the now-discredited "special public interest" justification of *Crane* v. *New York*, 239 U.S. 195 (1915) and *Heim* v. *McCall*, 239 U.S. 175 (1915) was in vogue. See *Sugarman*, 413 U.S. at 643-45. In order to justify discrimination against aliens, the State must show more than "any conceivable basis" which might justify the exclusion. In *Hampton* v. *Mow Sung Wong*, in which the rational relationship test was applied to the exclusion of aliens from federal civil service positions, this Court criticized the use of "hypothetical" justifications. 426 U.S. 88, 116, 48 L.Ed.2d 495, 516 (1976). While the "any conceivable basis" test might have been considered an appropriate standard in commercial and tax matters, *Trimble* v. *Gordon*, 45 U.S.L.W. at 4396; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 Geo. L.J. 1071, 1073 (1974), it has never been and will never be an appropriate standard for laws which discriminate on the basis of alienage. Such discrimination on the basis of class membership violates the basic constitutional policy of allocating benefits on the basis of individual merit; to validate such discrimination on the basis of mere hypotheses, which is certainly all that the State has offered here, is to give state legislatures a *carte blanche* to discriminate. *See id.* at 1099.

B. The Exclusion of Aliens From the State Police Actually Impairs the Effectiveness of That Force and the Stability of the Community

It is a well-established principle that "reasonable classification implies action consistent with the legitimate interests of the state." *Truax* v. *Raich*, 239 U.S. 33, 42 (1915). Far from serving the interests of the State in the maintenance of public order, the exclusion of aliens from the State Police may seriously hamper the effectiveness of that body in the performance of its duties. In a report entitled "Policed by the White Male Minority" (October 1976), the Florida Advisory Committee to the United States Commission on Civil Rights strongly condemned Florida's statutory exclusion of aliens from police forces.* The Committee noted that Florida, like New York, has a very large population of resident aliens, and found the citizenship requirement a hardship both for the alien community and for the police who must serve and protect these people of another culture and language. *Id.* at 22. The absence of members of this significant community in the police force of the State could easily lead to a breakdown in communication resulting in serious disorders. The importance of mutual understanding and communication between the police and the communities they serve cannot be gainsaid. The Florida Committee concluded that " . . . the employment of resident aliens by the Miami Police Department in proportions approximating their presence in their respective ethnic population in the city would be a positive factor in developing and maintaining healthy police-community relations in Miami." *Id.* at 72.**

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* Fla. Stat. Ann. §943.13 (Supp. 1976).

** The Committee had previously expressed its own doubts as to the constitutionality of Florida's exclusion of aliens from its police

The imposition of a citizenship requirement in this context could likewise defeat the purpose asserted by the State here in a second way. Presumably, the job of state trooper will be best performed by the persons most highly qualified, and to the extent that that person is an alien and excluded by § 215(3) of the Executive Law from that position, a less qualified person will fill the position. Note, *California Exclusion of Permanent Resident Aliens from Appointive Public Office*, 11 CALIF. W. L. REV. 117, 132 and n. 122 (1975). Thus, the "questionable basis" of such a provision which treats all citizens as deserving and all non-citizens as undeserving is underscored. *Purdy & Fitzpatrick* v. *State*, 71 Cal. 2d 566, 582, 456 P.2d 645, 656, 79 Cal. Rptr. 77, 88 (1969). Such a rule offends traditional notions of equal protection by excluding those more familiar with laws and customs and including those who are less familiar. Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, 1974 DUKE L.J. 871, 903-04. The State's interest can be better served by the testing of the individual applicant's understanding and knowledge of the laws in question, as is now done for all applicants. *In re Griffiths*, 413 U.S. at 725.

C. New York Statutory Exclusion of Aliens Is Not "Precisely Drawn" In Light of Its Acknowledged Purpose

In its discussion of the application of strict judicial scrutiny in *Sugarman*, this Court observed that a state's power "to apply its laws exclusively to its alien inhabitants as a class [was] confined with narrow limits." *Takahashi*, 334 U.S. at 420, and that therefore the Court must look "to the

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forces, *id.* at 71-72, 84-85, and recommended that the United States Department of Justice be urged to "consider the advisability of challenging the statute in the appropriate federal district court." *Id.* at 72, 85.

narrowness of the limits within which the discrimination is confined." 413 U.S. at 642. That obligation extends as well to statutes through which the State seeks to "define its political community [for] in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 643.

In *Sugarman*, the Court observed that the statute at issue, § 53 of the New York Civil Service Law, applied to the sanitation man, class B, as well as to the person who might formulate important public policy. In view of the wide sweep and imprecision of the statutory exclusion, this Court concluded that the ban on aliens could not stand. *Id.*

The same result is compelled in the instant case. The flat prohibition of New York Executive Law § 215(3) extends from troopers to deputy superintendents. Connelie Affidavit ¶ 14, App. D32-33. The duties performed by these officers range from searching for missing persons and issuing traffic summonses, *id.* at ¶ 8, App. D27-28, to the determination of priorities in the enforcement of laws and the command of Troops. *Id.* at ¶ 14, App. D32-33.

New York seeks to justify this broad discrimination on the grounds that all state troopers, by enforcing the laws of the State, "perform functions which go to the heart of representative government." 419 F. Supp. at 895, App. A24. Assuming *arguendo* that the tasks performed by some of the higher-ranking members of the force may reach the plane of political decision-making envisioned by this Court in *Sugarman*, then for those persons, a narrowly drawn citizenship requirement may be valid. However, in *Chavez-Salido* v. *Cabell*, 427 F. Supp. 158 (C.D. Cal. 1977), a three-judge court unanimously invalidated California Government Code § 1031(a) both on its face and as applied to the position of Deputy Probation Officer. The invalidated law

required all "peace officers" to be citizens of the United States. In striking it down, the court suggested, without reaching the issue, that California might "constitutionally enact a citizenship requirement for a narrowly confined class of the most important peace officers," * such as county sheriffs or city police chiefs. *Id.* at 171 n.24. Because the citizenship requirement of Executive Law § 215(3) is not confined to such positions, it is not "precisely drawn in light of the acknowledged purpose" and consequently violates the equal protection guarantee of the Fourteenth Amendment. *Sugarman,* 413 U.S. at 643. The issue of whether citizenship is an available requisite for a state to impose for a high-ranking policy-maker in the state police department is therefore not before the Court.

D. The Ends Sought by the State May be Achieved by Constitutionally Permissible Means

It is a settled principle of constitutional law that a State may not employ a constitutionally suspect classification when the end sought to be achieved by the State may be achieved by less restrictive means. *See, e.g., Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). As we have indicated above, the State's interest in the lolyalty of its state troopers may be assured by a loyalty oath. The State's interest in its state trooper's knowledge and understanding of the law may be ensured by the extensive testing and training to which state troopers are already subjected. Likewise,

* This distinction between upper-echelon policy-making and the actions of individual police officers was implicitly recognized by this Court in *Rizzo* v. *Goode,* 423 U.S. 362 (1976). In that opinion, *Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966) and *Hague* v. *C.I.O.,* 307 U.S. 496 (1939) were distinguished on the grounds that the constitutional wrongs complained of in those cases were the result of policy decisions made by high-ranking local officials. In *Rizzo,* the alleged constitutional violations were attributed to individual police officers and not to any official policy of the police chief. 423 U.S. at 373 n.8.

the State's concern for the proper exercise of discretion by its officers may be better ensured by thorough and comprehensive training and the appropriate supervision in this "para-military" organization.

CONCLUSION

New York's statutory exclusion of aliens from the State Police force is one last relic of a bygone era of baseless discrimination against aliens. As the Washington Supreme Court noted, "[w]e have long since passed that time in history when resident aliens of Boston were met with signs which read: 'Help wanted—Irish need not apply here for work!'" *Herriott* v. *City of Seattle,* 81 P.2d 42, 60, 500 P.2d 101, 109 (1971).

For the foregoing reasons, we respectfully request that this Court reverse the decision of the District Court.

Dated: New York, New York
June 9, 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Appellants,

against

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

PAGE

Statement of the Case 1

The New York State Police 3

Summary of Argument 7

POINT I—Executive Law § 215(3) does not violate the Equal Protection Clause because it excludes aliens from membership in the New York State Police. State Police perform discretionary, sovereign functions for which the alien is unsuited because of his continuing allegiance to the country of his nationality. Although properly reviewed under the traditional equal protection test, Section 215(3) survives strict scrutiny because the state interests are substantial and the classification is precise 8

A. The traditional equal protection test requiring a showing of only a reasonable relation to a legitimate state interest is applicable to Executive Law § 215(3) 8

B. The exclusion of aliens from the New York State Police under Executive Law § 215(3) bears a "necessary" relation to "substantial" state interests in the integrity of that force. State Police perform discretionary, sovereign functions for which the alien is unsuited because of his continuing allegiance to the country of his nationality 12

Conclusion 20

PAGE

Table of Cases

Afroyim v. *Rusk*, 387 U.S. 253 (1967) 12

American Commuters Assoc. Inc. v. *Leavitt*, 279 F. Supp. 40 (S.D.N.Y. 1967), *aff'd* 405 F. 2d 1148 (2d Cir. 1969) 19

Chavez-Salido v. *Cabell*, 427 F. Supp. 158 (C.D. Cal. 1977), Jurisdictional Statement filed, —— U.S. —— (No. 76-1616, May 17, 1977) 10

City of Albany v. *Standard Accident Insurance Co.*, 8 A.D. 2d 247, 187 N.Y.S. 2d 242 (Third Dep't. 1959) 14

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 7, 9, 12

Dwen v. *Barry*, 483 F.2d 1126 (2d Cir. 1973) 6

Examining Board v. *Flores de Otero*, 426 U.S. 572 (1976) 10, 11

Graham v. *Richardson*, 403 U.S. 365 (1971) 9, 10

Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976) ..10, 18

Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 12

In Re Griffiths, 413 U.S. 717 (1973) 9, 10, 11, 16, 17, 18

Kelly v. *Pittsburgh*, 104 U.S. 78 (1881) 19

Kramer v. *Union School District*, 395 U.S. 621 (1969) 17

Mathews v. *Diaz*, 426 U.S. 67 (1976) 17

Minor v. *Happersett*, 21 Wall. 162 (1875) 12

Morton Salt v. *City of South Hutchison*, 159 F. 2d 897 (10th Cir. 1947) 19

Nyquist v. *Mauclet*, —— U.S. ——, 97 S.Ct. 2120 (1977) 9, 10, 18

Oregon v. *Mitchell*, 400 U.S. 112 (1970) 17

PAGE

People v. *Peters*, 44 Misc. 2d 470, 254 N.Y.S. 2d 10 (Sup. Ct. Westchester Co. 1964) 5

Perkins v. *Smith*, 370 F.Supp. 134 (D. Md. 1974), *aff'd* 426 U.S. 913 (1976) 11, 16, 17, 19

Pierson v. *Ray*, 386 U.S. 547 (1967) 14

Reynolds v. *Sims*, 377 U.S. 533 (1964) 17

Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 14

Sugarman v. *Dougall*, 413 U.S. 634 (1973) .....*passim*

Trimble v. *Gordon*, —— U.S. ——, 45 U.S.L.W. 4395 (April 26, 1977) 10

Truax v. *Raich*, 239 U.S. 33 (1915) 10

United States v. *Cruikshank*, 92 U.S. 542 (1896) 12

United States v. *Gordon-Nikkar*, 518 F. 2d 972 (5th Cir. 1975) 11, 16, 17

Weber v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) 10

Federal Constitution and Statutes

U.S. Const. Art. IV, § 4 9
Amdt. X 9

8 U.S.C. § 1101 18
§ 1257 18
§ 1421 17
§ 1427 ..... 2, 18
§ 1439 2
§ 1448 17

10 U.S.C. § 5571, 3285 18
50 U.S.C. App. § 454 18
§ 456 18

State Statutes

N.Y. Executive Law — PAGE

§ 31 3
§ 210 3
§ 215 5
§ 215(3) ..... *passim*
§ 216 ..... 4, 5, 6
§ 223 ..... 3, 4
§ 225 4
§ 225(a) 4

New York Public Officers Law, § 3 14
New York Laws of 1917, c. 161 2

Federal Regulations and Orders

32 C.F.R. § 1611.2 18
§ 1611.3 18

Executive Order No. 11,935, 41 Fed. Reg. 37301 (1976) 18

State Regulations

9 New York Code, Rules and Regulations, § 475.1 ..2, 3, 6
§ 475.2 .. 6

Miscellaneous

American Bar Association, Standards Relating to the Urban Police Function (tent. draft 1972) 6, 15

Aliens' Right to Work: State and Federal Discrimination, 45 Fordh. L. Rev. 835 (1977) 12, 13

PAGE

Bent, The Politics of Law Enforcement (1974) ..13, 14, 15, 16

Bittner, *The Capacity to Use Force as the Core of the Police Role,* Police in America 61 (1975, Skolnick, ed.) 15

Borchard, Diplomatic Protection of Citizens Abroad (1927) 12

Das, *Discrimination in Employment Against Aliens —The Impact of the Constitution and Federal Civil Rights Laws,* 35 U.P.H. L. Rev. 499 (1974) ..11, 13

J. Fisk, The Police Officer's Exercise of Discretion in the Decision to Arrest: Relationship to Organizational Goals and Societal Values (1974) 14, 15, 16

J. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice,* 69 Yale L. J. 1 (1960) 16

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Hall, *Police and Law in a Democratic Society,* 28 Ind. L. J. 133 (1953) 13

LaFare, Arrest, The Decision To Take a Suspect Into Custody (1965) 15, 16

M. C. Dillon, *What are Police For?* The Police in Society 16 (1972, Viano & Reiman eds.) 15

McDougal, Lasswell & Chen, *The Protection of Aliens from Discrimination and World Public Order; Responsibility of States Conjoined with Human Rights,* 70 Am. J. Int'l L. 432 (1976) 12

PAGE

National Advisory Commission on Criminal Justice Standards and Goals, Police (1973) 14, 15

Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications, 62 Geo. L. J. 1071 (1974) 11

Police and Law Enforcement 1972 (1973, Curran et al. eds.) 14

Wandering Between Two Worlds: Employment Discrimination Against Aliens, 16 Va. J. Int'l L. 355 (1976) 11

J. Wilson, Varieties of Police Behavior (1968) 15

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

Edmund Foley, individually and on behalf of all other persons similarly situated,

Appellants,

against

William G. Connelie, individually and in his capacity as Superintendent of the New York State Police, and S. A. Smith, individually and in his capacity as Director of Personnel of the New York State Police,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Statement of the Case

Appellant Foley has lived in New York State as a permanent resident alien since February, 1973 (D. 7†).* In

† References prefixed by the letter "D" refer to the Appendix filed on this appeal.

* Neither the date plaintiff first entered the United States nor his entering status is alleged (D. 7, D. 17).

August, 1975, appellant applied to compete in the then forthcoming September examination series for appointment as a member of the New York State Police (D. 10). His application was denied because, as an alien, he was not qualified for appointment (D. 10, D. 15). New York Executive Law § 215(3).

By order dated September 19, 1975, District Judge Pollack permitted appellant to compete in the September examination series without obtaining any right to appointment.* Appellant ranked 3,183 on the resulting eligible list of 3,627 passing candidates. Appellees have appointed 75 candidates to date (through number 135 on the eligible list). One hundred and fifty (150) additional appointments are pending. The eligible list was established on June 1, 1976 and will probably be superseded by a list from a new examination series on or about December 30, 1979. Executive Law § 215(3); 9 New York Code, Rules and Regulations ("N.Y.C.R.R.") § 475.1.

Although the record is silent as to both the date appellant first entered the United States as a permanent resident and his age, he repeatedly alleges that he was not in this country long enough to become naturalized prior to the September 1975 examination series and that he will be too old to meet the statutory age requirement for appointment in succeeding examination series. Appellant's brief ("Brief"), pp. 17 note, 26 and note; Reply brief in the district court, p. 10; and MANSFIELD, C.J. dissenting, A. 47n.1. Appellant can be naturalized within five years from the date of his permanent residence, 8 U.S.C. § 1427(a), or within three years if he performs military service. 8 U.S.C. § 1439(a). Appointees to the State

* The substance of this initial order has been continued to date by the district court with the consent of the appellees (B-1). References prefixed by the letters "A," "B" or "C" refer to the respective Appendices to the Jurisdictional Statement filed on this appeal.

Police are generally required to be between 21 and 29 years of age, but the Superintendent may extend the maximum age to 35. Executive Law § 215(3); 9 N.Y.C.R.R. § 475.1. Extensions of the 29 year limit for up to 6 years are mandatory for military service. Executive Law § 215(3).

The New York State Police

The New York State Police is a division of the executive branch of the state government. Executive Law § 31(4). The Governor is the Commander-in-Chief (D-24). The principal executive officer is the Superintendent who is a member of the Governor's cabinet and appointed with the advice and consent of the State Senate. Executive Law § 210. The force was created in 1917. New York Laws, c. 161 (April 12, 1917). The original legislation required that all members be citizens, *Ibid.*, and this requirement has been enforced to date without exception or modification (D. 26-D. 27). Executive Law § 215(3).*

The State Police is the only police force in New York with statewide jurisdiction (A. 28, D. 25). Executive Law § 223. When operating within the territory of a political subdivision, its jurisdiction is concurrent with, not preempted by, that of the local police (D. 25).** Generally stated, the purposes of State Police are to prevent and detect crime and apprehend criminals, to prevent and detect subversion and other threats to state security and to maintain good public order. Executive Law § 223; Con-

* In addition to being citizens, eligible appointees must meet age requirements, be physically and mentally fit, have good moral character and pass the appropriate competitive tests. Executive Law § 215(3); 9 N.Y.C.R.R. § 475.1.

** The only circumstance in which State Police may not operate within a locality is to suppress rioting and disorder within a city. They must then await the direction of the Governor. Executive Law § 223. Majority opinion, A. 26-A. 27, A. 29.

nelie affidavit, D. 24, D. 29.* In pursuit of these purposes, the State Police co-operate with federal authorities in the investigation of violations of federal felony laws, Executive Law § 216, and with all state and local authorities. Executive Law § 223; Connelie affidavit, D. 28, D. 29-D. 30. In 1974, the State Police made over 50,000 arrests for felonies, misdemeanors and offenses, for crimes ranging from homicide and assault to larceny and drug violations, in addition to issuing over 500,000 summonses for vehicle and traffic violations. Connelie affidavit, D. 28. Two hundred of the arrests were for violations of the federal immigration laws and were made in co-operation with federal authorities (D. 30). See majority opinion, A. 25-A. 27, A. 28, A. 29, A. 32-A. 33.

State Police Officers enforce the New York Penal Law and numerous other statutes describing criminal and quasi-criminal behavior including New York's Criminal Procedure Law, Public Health Law, Mental Hygiene Law and Conservation Law.** Executive Law §§ 223, 225. Connelie affidavit, D. 24, D. 25-D. 26. In pursuit of these duties, State Police Officers are empowered to "arrest, without a warrant, any person committing or attempting to commit within their presence or view a breach of the peace or other violation of law" and "to serve and execute warrants of arrest or search" in any part of the state according to the tenor of their indorsement. Executive Law § 223; Connelie affidavit, D. 24-D. 25. Officers are on call 24 hours a day. They must carry a weapon while on duty and are authorized to do so while off-duty. Connelie affidavit, D. 25.

They must take appropriate action whenever they believe a crime has been committed. Executive Law § 223; Connelie affidavit, D. 24-D. 25. "A police officer on 'off-

* State Police officers also act as prosecutors of vehicle and traffic offenses in local justice courts. Connelie affidavit, D. 31.

** The State Police also hold and dispose of lost personal property. Executive Law § 225-a. Majority opinion, A. 27.

duty' status is nevertheless not relieved of his obligation as an officer to preserve the public peace and to protect the lives and property of the public in general." *People v. Peters,* 44 Misc. 2d 470, 254 N.Y.S. 2d 10, 12 (Sup. Ct. Westchester Co. 1964). In all their actions, officers must observe a zealous regard for the constitutional and statutory rights and liberties of the individuals with whom they come in contact. Connelie affidavit, D. 30-D. 31. See majority opinion, A. 26-A. 27, A. 28.

The New York State Police consists of approximately 3,316 men and women (D. 24). There are three functional units: the Governor's Detail which protects the life of the state's Chief Executive and the lives of visiting foreign dignitaries (D. 29, A. 36); the Bureau of Criminal Investigation ("BCI") consisting of "plainclothes" detectives who conduct investigations of state security matters and organized crime and continue investigations initiated by uniformed officers when necessary (D. 27-D. 28; Executive Law § 216); and the Uniform Force which, through patrol and investigation, provides a "first-line" response (D. 27-D. 28). Members are deployed in nine Troops and at Albany central office. Each Troop has a headquarters and substations and covers a distinct geographic region of the state. Troops have between 200 and 380 members including both uniformed and BCI personnel.* Executive Law § 215(1); Connelie affidavit, D. 32-D. 33). Assignments within a Troop are rotated routinely approximately every two weeks, and Troop assignments are generally rotated every two years.

All members are assigned a "para-military" rank, e.g. Trooper (the entry-level position), Sergeant, Lieutenant, Captain, Major. Executive Law §§ 215(1)(b), 216; Connelie affidavit, D. 24, D. 32. Appointments and promotions in the Uniform Force for the ranks of Trooper through

* Troop T Thruway has no BCI personnel.

Lieutenant are made on the basis of competitive tests and Superintendent discretion. Executive Law § 215(3); 9 N.Y.C.R.R. § 475.1; Connelie affidavit, D. 33. Other appointments are within the Superintendent's discretion. However, all members in good standing are initially considered eligible for promotion. Executive Law § 216(1); Connelie affidavit, D. 33.

Appellant's characterization of the State Police as "para-military" in the sense that it is a "military hierarchy with strict accountability to superiors," "control over individual troopers . . . at all times," and "[s]uperior officers[']* exercise of authority contemporaneous to the officer's activity" is without foundation in the record. Brief pp. 11-12, 18, 33. Dissenting opinion, A. 42, A. 52-A. 53, A. 64. In fact, the unrebutted evidence of Superintendent Connelie is expressly to the contrary (D. 31): "Because *most police work is conducted beyond direct supervision,* we must rely upon each officer's faithful and undivided allegiance to the Constitution and the individual rights guaranteed by it . . . ." (Emphasis added.) See majority opinion, A. 24. *Owen* v. *Barry,* 483 F.2d 1126, 1128-29 (2d Cir. 1973), rejecting analogy between military and civilian police force. American Bar Association, Standards Relating to the Urban Police Function, § 4.1, p. 117 (tent. draft 1972) ("ABA Standards"), rejecting "persistent myth" that police are ministerial officers.

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* The State Police Academy currently requires that probationary Troopers be rated, *inter alia,* on their ability to work without supervision and to assume responsibility. The ratings are administered by peers and supervisors three times during the 20 week training program given to new members. See Executive Law § 215(3); 9 N.Y.C.R.R. §§ 475.1, 475.2.

Summary of Argument

The New York State Police prevent, detect and prosecute crime to protect the security of the state and the well-being of all of its residents. They perform the discretionary, sovereign functions of arrest and search and control the legitimate use of force in civilian society.

Executive Law § 215(3) distinguishes between citizens and aliens for the specific and limited purpose of qualifying the members of this police force. The classification so established consists of "important nonelective executive . . . officers who participate directly in the formulation, execution, or review of broad public policy," *Sugarman* v. *Dougall,* 413 U.S. 634, 647 (1973), from which aliens may be excluded under a test of reasonableness. *Ibid.* Section 215(3) also survives strict scrutiny under the Equal Protection Clause because it is precisely drawn to effectuate New York's substantial interests in defining and preserving its "political community." *Dunn* v. *Blumstein,* 405 U.S. 330, 344 (1972).

POINT I

Executive Law § 215(3) does not violate the Equal Protection Clause because it excludes aliens from membership in the New York State Police. State Police perform discretionary, sovereign functions for which the alien is unsuited because of his continuing allegiance to the country of his nationality. Although properly reviewed under the traditional equal protection test, Section 215(3) survives strict scrutiny because the state interests are substantial and the classification is precise.

A. The traditional equal protection test requiring a showing of only a reasonable relation to a legitimate state interest is applicable to Executive Law § 215(3).

New York State Police Officers perform discretionary, sovereign functions for the preservation of state government and for the protection of all persons within New York. Majority opinion, A. 22-A. 24. They are "persons holding . . . important non-elective executive . . . positions . . . who participate directly in the formulation, execution or review of broad public policy [and therefore] perform functions that go to the heart of representative government." *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973). Majority opinion, A. 23.* Executive Law § 215(3) distinguishes between citizens and aliens for the sole purpose of qualifying these Officers. The resulting classification is "closely" and "appropriately" "defined," "uniform and consistent" and related to the "'special demands of [a] particular position'" or "class of positions." 413 U.S. at 639, 647 in part quoting decision below, 339 F. Supp. 906, 911 (S.D.N.Y. 1971) (LUMBARD, C.J. concurring). It is, therefore, properly excepted from strict equal protection scrutiny under the standards established

* See pp. 13-17 *post*, for a discussion of the sovereign nature and importance of the State Police Officer's responsibilities.

by this Court in *Sugarman* v. *Dougall*, *supra* at 642-43, 647-49 (applying heightened test to citizenship requirement that included menial and high public positions but stating that scrutiny of such requirements for appropriately defined classes of public office holders would not be so demanding). See *In Re Griffiths*, 413 U.S. 717, 729 (1973), applying heightened test to citizenship requirement for admission to the bar but finding that attorneys were not public office holders by virtue of their professional status.

The continuing appropriateness of the reasonable relation test to certain classifications "based on alienage," *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971), recognizes the constitutional power of the states to establish their own republican form of government, U. S. Const. Art. IV, § 4, and the reservation of all powers not delegated to the federal government to states and to the people. U. S. Const. Amdt. X. *Sugarman* v. *Dougall*, *supra* at 647-49. Acting within these powers and consistently with the obligation "to preserve the basic conception of a political community," *Dunn* v. *Blumstein*, 405 U.S. 330, 344 (1972), a state may prescribe the qualifications of its own officers and invoke alienage as a criterion for that purpose since alienage itself is a basis for exclusion from democratic political processes and a factor that reasonably can be employed in defining "political community." *Sugarman* v. *Dougall*, *supra* and cases cited. *Nyquist* v. *Mauclet*, —— U.S. ——, 97 S.Ct. 2120, 2126 (1977). As the district court majority correctly observed (A. 22), the judicial solicitude reflected in strict scrutiny is intended to protect the interests of aliens when political processes may be insufficient for that purpose, not to open those processes to alien participation.

The application of the reasonable relation test to Executive Law § 215(3) is not opposed by the prior decisions of this Court in favor of aliens' rights of access to state regulated employment or benefits. *Examining Board* v. *Flores*

de Otero, 426 U.S. 572 (1976) (civil engineering), like *Dougall* and *Griffiths*, involved "common occupations of the community." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915). See also *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976) (federal civil service employment). -The exclusion of non-declarant aliens from grants and loans considered in *Nyquist* v. *Mauclet*, *supra*, was held too remote from the state's interest in defining and preserving its "political community" to warrant review under the relaxed standard, and the exclusion of aliens from welfare benefits considered in *Graham* v. *Richardson*, *supra*, unrelated to any permissible state interest. No decision has rejected the application of the reasonable relation test to the exclusion of aliens from an appropriately defined class of state offices.*

Appellant's reliance on *Trimble* v. *Gordon*, — U. S. — 45 U.S.L.W. 4395 (April 26, 1977) and *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), is misplaced. Brief, pp. 16-17. Those cases do not apply a strict scrutiny standard. Nor are aliens similarly situated with illegitimate children. The alien can change his status; the illegitimate child cannot. While illegitimacy may be an irrelevant characteristic for most all regulatory purposes, alienage is relevant to qualifying for state office. *Sugarman* v. *Dougall*, *supra*, and at 657 (REHNQUIST, J. dissenting). See Das, *Discrimination in Employment Against*

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* The lower court opinions cited as supporting in the Brief, *Amici Curiae*, p. 16 n. 28, are distinguishable from the case at bar on the ground that they, like *Flores de Otero*, *Dougall* and *Griffiths*, involved limitations on access to "common occupations," not state offices. The only lower court opinion in which state office is considered is *Chavez-Salido* v. *Cabell*, 427 F. Supp. 158, 159-71 (C.D. Cal. 1977), Jurisdictional Statement filed, —— U.S. —— (No. 76-1616, May 17, 1977). There the district court invalidated a citizenship requirement applicable to all "peace officers" noting that the statute swept indiscriminately in its coverage of menial (cemetery employees) and important (Sheriff) law enforcement positions. Executive Law § 215 (3) does not present a comparable issue.

Aliens—The Impact of the Constitution and Federal Civil Rights Laws, 35 U. Pitt. L. Rev. 499, 520 (1974) ("Das"), stating that once a state has determined that a class of positions should be closed to aliens because it involves direct participation in government under the *Dougall* standard, that determination should not be rejected by the court if it is reasonable even though a narrower classification might also be reasonable; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 Geo. L.J. 1071, 1097 (1974), reading *Dougall* as requiring a showing of only a theoretical rational relationship to the special demands of a particular class of positions; Note, *Wandering Between Two Worlds: Employment Discrimination Against Aliens*, 16 Va. J. Int'l L. 355, 397-98 (1976), noting differences between illegitimacy and alien status.

If Executive Law § 215(3) is strictly scrutinized, the inquiry is limited to whether or not New York has shown that its purpose or interest in the statute is "both constitutionally permissible and substantial and that its use of the classification is necessary . . . to the accomplishment of its purpose or the safeguarding of its interest." *In Re Griffiths*, *supra* at 721-22 (footnotes omitted). *Examining Board* v. *Flores deOtero*, *supra* at 602; *Sugarman* v. *Dougall*, *supra* at 642. The district court majority assumed the applicability of this test for purposes of its disposition and sustained the statute (A. 24- A. 41). Compare Brief, p. 5; Brief, *Amici Curiae*, pp. 2-3. Accord, *Perkins* v. *Smith*, 370 F. Supp. 134, 136 (D. Md. 1974), *aff'd* 426 U.S. 913 (1976) and *United States* v. *Gordon-Nikkar*, 518 F. 2d 972, 976 (5th Cir. 1975), both applying strict scrutiny *arguendo* to aliens' exclusion from federal and state grand and petit juries and sustaining exclusion.

B. The exclusion of aliens from the New York State Police under Executive Law § 215(3) bears a "necessary" relation to "substantial" state interests in the integrity of that force. State Police perform discretionary, sovereign functions for which the alien is unsuited because of his continuing allegiance to the country of his nationality.

A state is constitutionally empowered to conduct its sovereign affairs through the exclusive agency of its own citizens. *Sugarman* v. *Dougall, supra* at 642-43, 646-49. This principle rests on the fundamental identity between a state and its own people, or citizens. *Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596 (1952) (*Frankfurter, J.* concurring), *United States* v. *Cruikshank*, 92 U.S. 542, 549 (1896); *Minor* v. *Happersett*, 21 Wall. 162, 165-66 (1875). An alien, by definition, does not share this fundamental identity. Gordon & Rosenfeld, IMMIGRATION LAW AND PROCEDURE, § 11.3a (1976 rev. ed.) ("Gordon & Rosenfeld"); Borchard, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, §§ 4, 5 (1927) ("Borchard"); Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 Fordh. L. Rev. 835, 841-42 (1977) ("Aliens' Right to Work"). As a result, he may be excluded from participation in the government of his host state including appointive public office. *Sugarman* v. *Dougall, supra*. See *Dunn* v. *Blumstein, supra*, a state may limit participation in its government to "preserve the basic conception of a political community." Gordon & Rosenfeld, § 1.38; Borchard, § 34; McDougal, Lasswell & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 Am. J. Int'l L. 432 (1976), stating (at p. 433) that "[a]liens are . . . commonly denied access to voting and office-holding (appointive and elective alike)" and (at p. 438) that the "more important differential treatments that may be held permissible upon grounds of alienage would appear to be confined to those that relate

to participation in the making of community decisions (voting and office-holding)." (Footnotes omitted.); Das, pp. 516-518; Aliens' Right to Work, pp. 842-43. Indeed, as this Court has observed, the exclusion of aliens from a particular class of public offices evidences the governmental, or sovereign, nature of those offices since "alienage itself is a factor that reasonably could be employed in defining "political community." *Sugarman* v. *Dougall, supra* at 649.*

The district court majority found that New York's interest in the "maintenance of public order to effect the preservation of [its] political structure including the prevention, detection and prosecution of crime" provided compelling support for Executive Law § 215(3) (A. 38).** State Police Officers perform discretionary, sovereign functions to enforce this interest that "go to the heart of representative government." *Sugarman* v. *Dougall, supra* at 647. Majority opinion, A. 28-A. 37 and Connelie affidavit, D. 24-D.26, D. 27-D. 32. See Bent, THE POLITICS OF LAW ENFORCEMENT 2 (1974) ("Bent"), stating that the "enforcement of order is essential for the preservation of the State, and the police, as the agents charged with this responsibility, are intrinsic to this function at all levels of government,"*** and Hall, *Police and Law in a Democratic Society*, 28 Ind. L. J. 133, 141 (1953), stating that "policing in our culture is a public, political function." As such they constitute a class of "important nonelective executive . . . officers who participate directly in the formulation, execution or review of broad public policy" from which aliens may be excluded. *Sugarman* v. *Dougall, supra* and dis-

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* Aliens are excluded from positions as police officers in at least 29 states (A. 30-A. 32).

** Appellant concedes that these state interests are both permissible and substantial. Brief, p. 10.

*** Footnote omitted.

("Fisk") stating that the "power to arrest is political . . . because it is indispensable to the sovereignty of a government;" Bittner, *The Capacity to Use Force as the Core of the Police Role,* POLICE IN AMERICA 61, 62-67 (1975, Skolnick, ed.); Bent, p. 1; Hahn, *The Public and the Police,* POLICE IN URBAN SOCIETY 23 (1970, Hahn ed.); ABA Standards, § 2.1, pp. 49-50.

The Officer's exercise of his powers is discretionary. Fisk, pp. 3-6; Bent, p. 157; National Advisory Commission, § 1.3; ABA Standards, § 4.1, § 5.1, p. 145. His use of discretion arises from the fact that he operates under broadly stated and sometimes obsolete legislation, must establish enforcement priorities because of limited resources, often must respond immediately, often determines whether the public good is better served by an arrest or the failure to make an arrest and usually works alone or with one other Officer. LaFave, ARREST, THE DECISION TO TAKE A SUSPECT INTO CUSTODY 61-144 (1965) ("LaFave") and references last cited.

Commentators are generally agreed that police discretion is exercised most broadly and importantly by the lowest ranking officers on the force. J. Wilson, VARIETIES OF POLICE BEHAVIOR 8 (1968); Fisk, pp. 41-42; Hahn, p. 11; Bent, p. 157. Every time he determines whether or not to make an arrest or to use coercive force, the Officer must "weigh the evidence before him and judge which of the parties in conflict—individual or state—has the greater claim on the power residing within him." M. C. Dillon, *What Are Police For?* THE POLICE IN SOCIETY 16 (1972, Viano & Reiman eds.) The manner in which he acts is a "demonstration of his understanding and . . . a measure of [his] commitment to the political and social ideals of this country." Fisk, p. 9. Majority opinion, A. 29. Compare Brief, pp. 12-13, 15, 27, 30-32; Brief, *Amici Curiae,* pp. 20-24, 27-32; Dissenting opinion, A. 47-54.

cussion above, p. 9.* Commentators agree with the district court majority that the police officer's responsibilities are "awesome" (A. 28). Bent, p. 1; POLICE AND LAW ENFORCEMENT 1972, p. 417 (1973, Curran et al. eds.). This Court has similarly recognized the nature of the police officer's responsibilities by granting him qualified immunity akin to that of other high officers of the executive branch. *Scheuer* v. *Rhodes,* 416 U. S. 232, 245-46 (1974); *Pierson* v. *Ray,* 386 U. S. 547, 555-57 (1967).

New York recognized the sovereign role of the State Police Officer when it designated him a state civil, or public, officer, as distinguished from an employee, upon the creation of the force. Op. Atty. Gen., 13 N.Y. State Dep't 430 (1917) (A. 27-A.28).** Accord, *City of Albany* v. *Standard Accident Insurance Co.,* 8 A.D. 2d 247, 249, 187 N.Y.S.2d 242, 244 (Third Dep't 1959), police officers perform a governmental function. See *Sugarman* v. *Dougall, supra* at 640, noting that civil officers in New York exercise a portion of the sovereign power. This designation is attributable to the duties the officer performs and the manner in which he performs them.

The State Police Officer's powers of arrest and search and his control of the legitimate use of force in civilian society establish him as a sovereign officer of government. J. Fisk, THE POLICE OFFICER'S EXERCISE OF DISCRETION IN THE DECISION TO ARREST: RELATIONSHIP TO ORGANIZATIONAL GOALS AND SOCIETAL VALUES 9 (1974)

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* See also National Advisory Commission on Criminal Justice Standards and Goals, POLICE 9 (1973) ("National Advisory Commission"), stating: "The police in the United States are not separate from the people. They draw their authority from the will and consent of the people, and they recruit their officers from them. The police are instruments of the people to achieve and maintain order; their efforts are founded on principles of public service and ultimate responsibility to the public."

** New York Public Officers Law § 3 requires citizenship of all state civil officers. Appellant has not placed § 3 in issue.

The responsibilities of the State Police are no less sovereign or important than those of grand and petit juries from which aliens may also be excluded. Majority opinion, A. 29-A. 30. *Perkins* v. *Smith supra; United States* v. *Gordon-Nikkar, supra.* Both grand jurors, by indictment, and police officers, by arrest, are initiators of the criminal justice process. Both "decide which persons must answer to the state for alleged misdoings." *Perkins* v. *Smith,* 370 F. Supp. at 137. Both exercise non-reviewable discretion when they do not invoke the criminal process which, in the case of the police officer, "largely determine[s] the outer limits of law enforcement." J. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice,* 69 Yale L.J. 1 (1960); LaFave, pp. 61-144. Their factual determinations in this regard are "ultimate," like that of the petit juror in acquitting a criminal defendant, the petit juror's only non-reviewable, "unimpeachable" act. 370 F. Supp. at 136; Brief, p. 14. Grand and petit jurors in criminal cases apply broad legislative mandates to the facts as they "find" them. The police officer applies the same mandates in the same manner in the course of his daily routine albeit his role may be more significant since his obligation is continuing, and, as noted, his judgment alone initiates the criminal justice process. Both State Police Officers and jurors must resolve disputes in accordance with democratic principles and community mores, 370 F. Supp. at 140 (WINTER, J. concurring). Fisk, p. 9; Bent, p. 1. A single Police Officer, like a single juror, can "obstruct or distort the course of justice." 370 F. Supp. at 138. *United States* v. *Gordon-Nikkar, supra,* at 976. Accordingly, both classes of positions encompass functions that "go to the heart of representative government" from which aliens may be excluded. *Sugarman* v. *Dougall, supra* at 647. Compare Brief, pp. 13-14.

Appellants' identification with the attorney in *In Re Griffiths, supra,* rather than the jurors in *Perkins* v. *Smith,*

supra, and *United States* v. *Gordon-Nikkar, supra,* is unsound. Brief, pp. 19, 22. *Griffiths* held only that attorneys were not office holders as a result of their professional status because their activities might have only a tangential relationship to the affairs of government. It did not suggest that citizenship could not be required of attorneys who in fact held a public office.

In addition to the state's power to limit participation its government to its own citizens just reviewed, the alien possesses certain characteristics, incident to his status, which make him unsuited for the position of State Police Officer. Of particular importance is the denial of the right to vote in state and federal elections. *Sugarman* v. *Dougall, supra* at 648; *Oregon* v. *Mitchell,* 400 U.S. 112, 124-25 (1970) (BLACK, J.); *id.,* at 201 (HARLAN, J.); and *id.,* at 293-94 (STEWART, J.); *Kramer* v. *Union School District,* 395 U.S. 621, 625 (1969); *Reynolds* v. *Sims,* 377 U.S. 533, 567, 568 (1964). Appellant's position herein produces the anomalous result that individuals appointed to enforce the laws would have no voice in making the laws. Additionally, given this context, the alien's interest in enforcement would be more remote than that of the citizen although the *sine qua non* of the position is vigorous law enforcement. Other specific characteristics of alien status are reviewed in detail by the district court majority, A. 33-A. 35. All reflect the fact that the alien's primary allegiance to the country of his nationality continues until renounced in the course of naturalization. 8 U.S.C. § 1421 *et seq.* esp. § 1448.

Only recently, this Court recognized differing treatment citizens and aliens reflective of these characteristics as valid. *Mathews* v. *Diaz,* 426 U.S. 67, 78-79, 82-84 (1976), aliens with less than five years durational residence excluded from Medicare; *Perkins* v. *Smith,* 426 U.S. 913 (1976), affirming exclusion of aliens from juries on the basis of lower court opinions which rely on the alien's continuing allegiance to the country of his nationality and his

lack of demonstrable commitment to this country, 370 F. Supp. at 138 and at 139-42 (WINTER, J. concurring).

Appellant's reliance on the proposition that "'[r]esident aliens, like citizens, pay taxes, support the economy, serve in the [A]rmed [F]orces and contribute in myriad other ways to our society'" in support of his appointment to the State Police is misplaced. Brief, p. 25 quoting *In Re Griffiths, supra* at 722. *Nyquist* v. *Mauclet, supra* at 2127; *Sugarman* v. *Dougall, supra* at 645. Given the acceptance of both the cited proposition and the governmental participation standard in *Dougall,* they cannot be read against each other. See *Perkins* v. *Smith,* 370 F. Supp. at 135-36. Moreover, the alien is treated differently than the citizen in the Armed Forces, again reflecting the United States' acceptance of the alien's continuing identification with his homeland. See discussion above, p. 17. Only immigrant aliens are required to register for the draft, 50 U.S.C. App. § 456(a)(1), 32 C.F.R. § 1611.2(a), and immigrants may change their status to non-immigrant and thereby obtain an exemption from service. 8 U.S.C. § 1257(a); 32 C.F.R. § 1611.3. Resident aliens may also be exempted from service pursuant to treaty. 50 U.S.C. App. § 454 (a), 8 U.S.C. § 1101, 32 C.F.R. § 1611.2(b). Majority opinion, A. 34-A. 35. In 1976, there were fourteen such treaties in force, including one between the United States and the Republic of Ireland, appellant's homeland. Gordon & Rosenfeld, § 2.49c, p. 2-238. Nor does Congress repose the trust in alien soldiers that appellant suggests, Brief, pp. 21-22, 24, since it has barred them from holding commissioned offices in the Army, Navy and Marine Corps. 10 U.S.C. §§ 5571, 3285.* The fact that a resident alien

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* Citizenship for employment in the entire range of federal civil service positions was restored by Executive Order No. 11,935, 41 Fed. Reg. 37301 (1976), following this Court's invalidation of substantially identical Civil Service Commission regulations in *Hampton* v. *Mow Sun Wong, supra.*

pays taxes (as do citizens and non-resident aliens) does not entitle him to proportional public benefits much less entitles him to equal access to state public offices. *Kelly* v. *Pittsburgh,* 104 U.S. 78 (1881); *American Commuters Assoc. Inc.* v. *Leavitt,* 279 F. Supp. 40 (S.D.N.Y. 1967), *aff'd* 405 F.2d 1148, 1152-53 (2nd Cir. 1969); *Morton Salt* v. *City of South Hutchison,* 159 F.2d 897, 900-901 (10th Cir. 1947). See *Sugarman* v. *Dougall, supra* at 659 (REHNQUIST, J. dissenting).

The suggestion of appellant (Brief, pp. 10, 30, 31-32) and of the *Amici Curiae* (Brief, pp. 27-32) that the state interests encompassed by Executive Law § 215(3) can be achieved by a more narrowly drawn classification or by individualized determinations must be rejected. See also dissenting opinion, A. 60-A. 65. Every member of the State Police is engaged in preventing, detecting and prosecuting crime to keep public order and to preserve the political structure of the state. Majority opinion, A. 38 and discussion above, pp. 13-15. Every member is vested with specific governmental powers to achieve these ends. *Ibid.* No officer is without these powers, and none can be excused from invoking them. Connelie affidavit, D. 24-D. 26, D. 27-D. 32. Executive Law § 215(3) applies to this class of individuals alone. There are no State Police Officers who have failed to meet the citizenship requirement, and there never have been (D. 26-D. 27). Accordingly, the § 215(3) is narrowly drawn in light of New York's substantial purposes in qualifying its Police Officers. *Sugarman* v. *Dougall, supra* at 642 and cases cited above at p. 11. The use of individualized determinations would not advance any state interest since alienage itself is the relevant qualifying factor to be elicited. Moreover, the relationship between the individual and the state which § 215(3) seeks to protect is not amenable to test or measurement, *Perkins* v. *Smith,* 370 F. Supp. at 140, 141-42 (WINTER, J.

concurring), but only to naturalization, a process within the exclusive jurisdiction and control of Congress. *Id.* at 138 and at 141-42 (WINTER, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated, New York, New York, August 23, 1977.

Respectfully submitted,

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* The Attorney General acknowledges the co-operation of Richard Kogen, Legal Aide, in the preparation of this brief.

FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

PAGE

Restatement and Clarification of the Case 1

Point I—

The Exclusion of Aliens From Employment Must Be Given Strict Judicial Scrutiny and Measured by a Compelling State Interest Test 3

Point II—

Appellees Have Failed to Meet Their Burden of Justifying New York Executive Law § 215(3) Under Either the Strict Scrutiny or the Rational Relationship Test 7

Conclusion 10

Table of Authorities

Cases:

Graham v. *Richardson*, 403 U.S. 365 (1971) 4

In Re Griffiths, 413 U.S. 717 (1973) 4, 5, 8, 10

Nyquist v. *Mauclet*, —— U.S. ——, 53 L.Ed. 2d 63 (1977) 4, 6

Sugarman v. *Dougall*, 413 U.S. 634 (1973) 4, 5, 5n, 10

Statutes:

New York Education Law § 661(3) (McKinney 1969) 6

New York Executive Law § 130 (McKinney 1972) 5n

PAGE

New York Executive Law § 215(3) (McKinney 1972) 2, 3, 6, 7, 7n, 10

U.S. Const., Amend. XIV 7n, 10

United States Code
8 U.S.C. § 1427(a)(1) 2, 7n

Authorities:

Gordon & Rosenfeld, *Immigration Law and Procedure* § 2.49c (1977 ed.) 9

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SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

Restatement and Clarification of the Case

Appellees have, for the first time, raised questions about appellant Foley's eligibility for naturalization prior to the September, 1975 competitive examination for the New York State Police Force and about his ability to meet statutory age requirements for appointment to the Force by the time he is able to attain the status of a United States citizen.

Brief for Appellees, p. 2. These facts have never been put in issue at any prior stage of this litigation.

Appellant Foley was born on June 20, 1950. He first entered the United States on a visa in February, 1973. He obtained permanent resident alien status on October 31, 1974 and he will not become eligible to apply for naturalization until October 31, 1979, when he will have fulfilled the five-year residency requirement for United States citizenship, 8 U.S.C. § 1427(a). These facts are a matter of public record with the Immigration Service. By the time he becomes eligible to apply for naturalization on October 31, 1979, appellant Foley will have passed his twenty-ninth birthday, and he will therefore be ineligible for initial appointment to the New York State Police Force under Executive Law § 215(3) which provides that appointees must be "between the ages of twenty-one and twenty-nine years." (McKinney 1972). Although the statute enables the Superintendent of the New York State Police to extend the maximum age to thirty-five at his discretion, appellant Foley was not informed of this possibility at the time of his application. There has never been any indication that the Superintendent would be prepared to waive the usual age requirement, and none of the papers or affidavits submitted in this case by appellees have ever addressed this issue. In any event, such a waiver could not possibly apply on a class basis. There will always be aliens whose age will exceed the statutory maximum for appointment to the Police Force by the time they are eligible for United States citizenship.

Appellees have also introduced new factual allegations as to appellant Foley's performance on the September 20, 1975 examination for the first time in their brief. Brief for Appellees, p. 2. Neither appellant nor his counsel has ever

received any notification of the results of the tests. The reference to his standing is without basis in the record. If appellant prevails in this case, he will try to get his test score and, if not satisfied, the raw data which formed the basis of the result.

In any case, the score which appellant Foley received on the competitive examination is entirely irrelevant to the constitutional issue before the Court. The appellants in this action are not seeking a guarantee of employment with the New York State Police Force. Rather, they are asserting their right to be considered for the position of State Trooper without regard to their alien status. The fact that this case has been certified as a class action makes it clear that appellant Foley's performance on the examination cannot affect the justiciability of this important equal protection issue.

POINT I

The Exclusion of Aliens From Employment Must Be Given Strict Judicial Scrutiny and Measured by a Compelling State Interest Test.

The appellant in this case has been placed in the peculiar posture of arguing from what is usually the appellee's position. The precedents and principles are all on appellant's side. It is up to the appellees to find some way of distinguishing Executive Law § 215(3) from the many similar alienage classifications which have been struck down by this Court. But turn and twist as they will, they can find no such loophole.

New York Executive Law § 215(3), by barring any employment of aliens in the entire New York State Police Force, has clearly created a classification which is "in-

herently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). Appellees, as the first step in seeking to distinguish the overwhelming weight of precedent, have relied on the suggestion in *Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) that classifications which "deal with matters resting firmly within a state's constitutional perogatives" may be subjected to a "less demanding standard" than the one enunciated in *Graham* and have attempted to invoke the more lenient rational relationship test for the eligibility requirement at issue in this case. But, this Court's recent decision in *Nyquist* v. *Mauclet*, —— U.S. ——, 53 L.Ed. 2d 63 (1977) reaffirms the federal judiciary's obligation to subject alienage classifications to a "stringent examination." *Nyquist* v. *Mauclet*, 53 L.Ed. 2d at 70. According to *Mauclet*, a defendant's allegations that a given alienage classification has been adopted pursuant to the state's interest in preservation of its "political community" will not be accepted at face value and will not be sufficient to invoke the exception suggested in *Sugarman*. The majority opinion in *Mauclet* explains that in carving out an exception to the traditional strict scrutiny standard for alienage classifications, "the Court [in *Sugarman*] had in mind a State's historical and constitutional powers to define the qualifications of voters, or of 'elective or important nonelective officials' who 'participate directly in the formulation, execution or review of broad policy.'" (Footnotes omitted) *Nyquist* v. *Mauclet*, *supra*, 53 L.Ed. 2d at 72 quoting *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973). The *Mauclet* decision points to *In Re Griffiths*, 413 U.S. 717 (1973) as evidence of "the narrowness of the [*Sugarman*] exception," stressing the fact that the citizenship requirement for admission to the Connecticut bar was invalidated in *Griffiths*, "despite a recognition of the *vital public and political role* of attorneys" in our society. (Emphasis added) *Nyquist* v. *Mauclet*, *supra*, 53 L.Ed. 2d at 72.

The Court recognized in *In Re Griffiths* that one who performs a "vital public and political role" need not be "so close to the core of the political process as to make him a formulator of government policy" within the meaning of the limited *Sugarman* exception. *In Re Griffiths, supra*, 413 U.S. at 729. Appellees themselves have called the New York State Police Force a "paramilitary" operation, and whatever degree of "discretion" police should or do have (and appellant finds appellees' characterization of the police officer's discretionary functions somewhat overstated), it is clear that its members do not "participate directly in the formation, execution or review of broad public policy." Their occupation, though necessary to the general welfare, involves neither the broad discretion nor the important legal and judicial functions which characterize the "vital public and political role" of attorneys.

Litigation is one form of making public policy—acting as a policeman is not. The police officer's discretion, if any, is exercised after policy decisions and political input have been made. Policemen work for a law *enforcement* agency. Lawyers affect the laws which policemen enforce. If aliens can be lawyers, they can *a fortiori* be policemen as well.* The law enforcement responsibilities of individual police officers involve the application of existing policy rather than the formulation of broad new policy.** Pursuant to

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* In addition to performing many other important public functions, American lawyers are officers of the court, are permitted to affirm papers in Federal Courts and in many states, including New York, are automatically eligible for appointment as notaries public. Executive Law § 130 (McKinney 1972).

** Even the highest-ranking members of the New York State Police Force do not engage in the type of broad political decision-making which triggers the *Sugarman* suggestion and legitimates alien exclusion. In any case, as more fully set forth in the Brief for Appellants at pages 31-32, a finding that a citizenship requirement might be appropriate for *some* police positions could not save the New York statute's flat prohibition on alien membership in the entire Force.

the State of New York's interest in preserving its "political community," an alien "may be barred from full involvement in the political arena, [but] he may play a role—perhaps even a leadership role—in other areas of import to the community." *Nyquist* v. *Mauclet, supra,* 53 L.Ed. 2d at 72.

Edmund Foley and the other aliens who are excluded from membership in the New York State Police Force by reason of Executive Law § 215(3) have an even stronger argument for invoking close judicial scrutiny than did the plaintiffs in *Mauclet.* The statute at issue in *Mauclet,* New York Education Law § 661(3), provided that resident aliens would be eligible for state financial assistance for higher education only if they had made application to become United States citizens or had submitted a statement affirming an intent to make such application as soon as they became eligible for citizenship. The dissenting opinions in *Mauclet,* in arguing that a strict scrutiny standard was not the appropriate test under these circumstances, emphasized the fact that New York's refusal to award financial aid to resident alien students did not "deprive aliens of the essential means of economic survival" nor involve a crucial right such as the employment opportunity at stake here. *Id.* at 73. (Burger, J. dissenting). The dissenters also pointed out that each plaintiff in *Mauclet* had "at all times the means to remove himself immediately from the disfavored classification [by applying for citizenship or, if not presently eligible, by submitting a statement of intent to apply]." *Id.* at 77. (Rehnquist, J., dissenting). In contrast, the challenged statute in the instant case affects appellants' fundamental interest in securing employment and operates as an insurmountable barrier to aliens who are presently ineligible for United States citizenship.*

* Appellees' flat assertion that "the alien can change his status," Brief for Appellees, p. 10, is both inaccurate and inconsistent with their earlier admission that "an alien may wish to make a commitment [to the State's political community]" yet be "disabled from doing so because of durational residence aspects of the naturalization process." Motion to Affirm, p. 6. Appellant Foley and many other members of the appellant class are currently ineligible for naturalization because of the five-year residency requirement set forth in U.S.C. § 1427(a)(1) (1970). Appellees contend that his resultant ineligibility for employment in the Police Force is a "dilemma [which] is beyond the State's power to adjust." Motion to Affirm, p. 6.

The citizenship requirement of Executive Law § 215(3) has categorized these appellants by a factor which, like their race or sex, they are powerless to control. Appellants are presently unable to remove this statutory bar by "changing" their status to that of United States citizens; until they become eligible for naturalization, they are unable to avoid a period of discriminatory treatment. Contrary to appellees' assertions, the State of New York has the power—and, under the Fourteenth Amendment, the affirmative duty—to remove the "dilemma" which its statutes have forced on aliens who cannot change their status and who wish to become members of the New York State Police Force.

POINT II

Appellees Have Failed to Meet Their Burden of Justifying New York Executive Law § 215(3) Under Either the Strict Scrutiny or the Rational Relationship Test.

The State of New York has at no point demonstrated that the State Police Force's important functions would be in any way impaired by the inclusion on the Force of aliens who have demonstrated their personal commitment to the community and to effective law enforcement.* Indeed, the

* Appellees make much of the important social interest in having a police force, which appellant concedes. Brief for Appellees, pp. 3-4. But a general justification for an institution does not bear a justifying relationship to discriminatory exclusion. Public employment and the legal profession have important societal goals which are not relevant to and form no justification for alien exclusion. So here, the importance of a police force does not excuse discrimination in its composition.

amicus brief of the Mexican American Legal Defense and Education Fund and the Asian Law Caucus has demonstrated the contrary. There is absolutely no evidence that "the alien's primary allegiance to the country of his nationality continues until renounced in the course of naturalization." Brief for Appellees, p. 17. Nor is any basis proffered for this astonishing assertion. In *In re Griffiths,* this Court pointed out that the oath of office would provide sufficient guarantee of an alien attorney's loyalty. *In re Griffiths, supra,* at 726, n. 18. See Brief for Appellants, p. 21. And indeed if the oath of naturalization could prove the *bona fide* of performance, *a fortiori* a specific oath of allegiance designed by the New York State Police Force could provide the necessary guarantee of the alien applicant's loyalty and willingness to adhere to the department's requirements.

Appellees have attempted to undercut appellants' assertion that aliens are integral members of their communities and are capable of a high degree of personal commitment to effective law enforcement by citing examples of ways in which "the alien is treated differently than the citizen in the Armed Forces." Brief for Appellees, p. 18. Nothing in appellees' argument, however, negates the fact that the United States government has recognized the ability of aliens to uphold this country's laws and ideals through service in the Armed Forces.

The facts that certain aliens are able under the Selective Service laws to obtain exemptions from military service by changing their status to non-immigrant (an act of denying allegiance) and that aliens are barred from holding commissioned offices in three of the five services in no way negates the relevant fact that the federal government has entrusted its security to aliens as well as to citizens. Appellees' reliance on the existence of treaties between the

United States and various foreign countries providing for reciprocal exemption from military service is unfounded. These agreements have merely enabled so-called treaty nationals to apply through their embassies for a IV-C classification granting them a permanent exemption from military service. In obtaining such an exemption, treaty nationals lose their eligibility for United States citizenship and become amenable to exclusion if they leave the United States. Gordon & Rosenfeld, *Immigration Law and Procedure,* § 2.49c (1977 ed.). The federal government in allowing certain resident aliens to apply for exemptions in exchange for reciprocal rights for U.S. citizens makes no judgment about the loyalty or trustworthiness of aliens as a class. Rather, it gives aliens who do not wish to perform military service or to become U.S. citizens an opportunity to exempt themselves. Those treaty aliens who feel differently are entirely free to contribute to the national security through service in the Armed Forces.

By the same token, appellants, who on an entirely voluntary basis are prepared to undertake the dangerous job of law enforcement, cannot be denied access to their chosen occupation based on an irrelevant citizenship requirement. Rather, they must be allowed to demonstrate that their abilities and their personal commitment to the community qualify them for membership in the New York State Police Force.

CONCLUSION

New York Executive Law § 215(3)'s absolute statutory bar to the employment of aliens in the New York State Police Force creates a classification which cannot withstand strict judicial scrutiny under the equal protection clause of the Fourteenth Amendment. This baseless discrimination falls outside the State's interest in limiting participation in its most fundamental governmental processes to those within its "political community," an interest which this Court recognized as legitimate in *Sugarman* v. *Dougall*. It is instead analogous to the Connecticut rule excluding aliens from taking the state bar examination which was invalidated in *In Re Griffiths*. In this case as in *In Re Griffiths*, the State has totally failed to meet the "heavy burden" of justicication which is "appropriate . . . when it deprives [resident aliens] of employment opportunities." *In Re Griffiths, supra*, 413 U.S. at 722.

For the foregoing reasons, we respectfully request that this Court reverse the decision of the District Court.

DATED: New York, New York
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, *Appellant*,

v.

WILLIAM G. CONNELIE, ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Texas

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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Appellees.

On Appeal From the United States District Court for the Southern District of New York

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Mexican American Legal Defense and Educational Fund and the Asian Law Caucus hereby move the Court, pursuant to Rule 42(3) of its Rules of Practice, for leave to file the attached brief as amici curiae in support of reversal of the judgment below. This motion and the attached brief are timely filed within the time allowed for filing of Appellant's brief on the merits. Appellant has

given his consent to the filing of this brief by letter from counsel which has been filed with this Court. Appellee has declined to consent to this filing. In support of this motion, we rely on the following:

1. Interest of Amici Curiae.

The Mexican American Legal Defense and Educational Fund was founded in 1968 as a non-profit corporation under the laws of the State of Texas. The headquarters of the organization are now located in San Francisco, California with additional offices in San Antonio, Texas, Los Angeles, California, Denver, Colorado, and Washington, D.C. MALDEF's primary purpose is to secure the civil rights of persons of Mexican descent through litigation and education.

In its efforts to assist its client community to achieve their rights under law, MALDEF has handled litigation challenging the traditional barriers faced by persons of Mexican descent including discrimination in employment. MALDEF is particularly concerned about the effects of non-job-related hiring criteria which limit employment opportunities for its client community and is intimately familiar with the hardships caused to Mexican Americans by exclusionary policies of employees.

MALDEF has been particularly concerned with governmental practices which operate to deny public employment opportunities to Mexican Americans. We have, therefore, participated amicus curiae before this Court in Hampton v. Mow Sun Wong, October Term, 1973, No. 73-1596, 48 L.Ed.2d 495 (1976). MALDEF has also litigated a substantial number of public employment discrimination cases in the lower federal courts; some of these, like Chicano Police Officers' Ass'n. v. Stover, 526 F.2d 431 (10th Cir. 1975), vacated for further consideration 49 L.Ed.2d 1181 (1976), involve police jobs similar to those at stake in the instant appeal.

The Asian Law Caucus is a non-profit, legal service and education organization dedicated to serving the legal needs of the San Francisco Bay Area Asian communities. Founded in 1972, the Caucus operates offices in Oakland and San Francisco and is in close communication with other Asian legal service groups such as the Asian American Legal Defense and Education Fund in New York City. A critical concern of the Caucus has been protection of the legal rights of Asian immigrants. Largely in response to the geometric increases of the Asian immigrant population, our efforts

concentrate heavily upon the development of legal information and workshops.

In relationship to alien Asians a significant issue area has emerged in the field of employment discrimination law. The Caucus is deeply aware of the profound consequences of institutionalization of discriminatory employment practices. No doubt these consequences affect all minority groups; however, discriminatory employment practices based upon alienage or race have an especially critical impact upon Asians, given the over 600% increase in legal Asian immigration since 1975. For this reason, the Asian Law Caucus has often participated in employment discrimination suits including Hampton v. Mow Sun Wong, supra, and Salazar, et al. v. California Blue Shield, C.A. No. 73-1081 CBR (N.D. Cal. 1973).

2. Facts and Questions That May Not Be Fully Presented by the Parties.

The largest group of aliens in the United States is Spanish-surnamed. MALDEF's client group includes the approximately six million Mexican American citizens and permanent resident aliens. Through representation of Mexican American individuals and classes we have learned much about the particular problems of

employment discrimination which confront them, and persons of Hispanic origin generally. We find that while the civil rights problems of Mexican Americans and other Hispanics have much in common with those of other minority groups, ours are also in many respects distinct. We offer our views on the issues presented by the instant case, therefore, from a civil rights perspective. We note the dearth of Mexican American and Hispanic police officers nationwide and in states of high resident alien population (most of it Hispanic), including those states adjacent to the Mexican border. Asian-American citizens and permanent resident aliens number over two million. Such aliens are concentrated in the large industrial states of New York, California and Illinois. The facts and questions we discuss may well differ from those briefed by Appellant, an Irish-American. Mr. Foley is, after all, a member of a national origin group which is not ordinarily considered the object of national origin discrimination except that based on alienage, and which is in many places, including New York, at least adequately represented on local police forces.

The foregoing considerations are relevant to disposition of the case. In determining

the constitutionality of New York Executive Law § 215(3), the Court must consider that that statute discriminates not only against all aliens as a group, but also against certain national origin categories of aliens who are, and have long been, the particular objects of discriminatory laws and practices akin to those of racial discrimination, cf. Castaneda v. Partida, 51 L.Ed.2d 498, 511 (1977). This Court should also consider, in deciding the case, the inhibiting effect that statutes like New York's have on achievement of the desirable goal that state and local police forces should more accurately reflect the background of the populations they serve and control, as we discuss in our brief.

3. Conclusion.

For the reasons stated above, the Mexican American Legal Defense and Educational Fund and the Asian Law Caucus move that the Court grant them leave to file their brief as amici curiae.

Respectfully submitted,

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TABLE OF CONTENTS

Table of Authorities.....ii

STATEMENT.....1

A. The Issue Presented Here.....1

B. The Issue Presented Has Far-Reaching Consequences for Citizens and Non-Citizens Alike.....3

1. The United States Has a Tradition of Welcoming Immigrants and a Policy of Providing Employment Opportunities to Them.....4

2. Large Numbers of Permanent Resident Aliens Are Precluded From Employment By Exclusionary Statutes.....5

3. Citizenship is Presently Required by the Vast Majority of Law Enforcement Agencies.....6

4. Law Enforcement Services in Minority Communities Are Adversely Affected By Police Department Citizenship Requirements Which Exclude Aliens of National Origin Minorities.....9

ARGUMENT.....16

I. THIS CASE IS CONTROLLED BY PRIOR DECISIONS REQUIRING INVALIDATION OF NEW YORK'S EXCLUSIONARY STATUTE.....16

A. The Issue Framed for This Case by Prior Decisions of This Court.....16

B. State Police Jobs Are Not So Different In Pertinent Respects As To Require a Result Different From That of Prior Decisions.....20

II. THE NEW YORK STATUTE VIOLATES PERMANENT RESIDENT ALIENS' RIGHT TO EQUAL PROTECTION.....23

CONCLUSION.....33

TABLE OF AUTHORITIES

Cases

C.D.R. Enterprises, Ltd. v. Board of Education, 412 F. Supp. 1164 (E.D. N.Y. 1976) (three-judge court), aff'd. 50 L.Ed.2d 742 (1977).....17

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Chan v. Scott, C.A. No. C-72-2049 CBR (N.D. Cal. 1972).....15

Chavez Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977).....7,8,17,22,29,30

Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).....28

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Examining Board v. Flores de Otero, 49 L.Ed.2d 65 (1976).....2,4,16,18,19,30

Graham v. Richardson, 403 U.S. 365(1971)..2,18

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Norwick v. Nyquist, 417 F. Supp. 913 (S.D. N.Y. 1976).....17,22,24,28, 29

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Ramos v. United States Civil Service Commission, 376 F. Supp. 361(D. P.R. 1974).....17

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Yick Wo v. Hopkins, 118 U.S. 356 (1886).....4

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Statutes

Ariz. Rev. Stat. Ann § 38-201.....7

Cal. Gov. Code § 1031(a).....7

Fla. Stat. Ann. § 943.13(2).....7

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Kan. Stat. Ann. § 74-2113.....7

Ky. Rev. Stat. Ann. § 16.040(2)(c).....7

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Nev. Rev. Stat. § 281.060(i).....7

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N.Y. Exec. Law § 215(3).....7

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Or. Rev. Stat. § 181-260(1)(a).....7

Pa. Stat. Ann. Tit. 71 § 1193.....7

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IN THE

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BRIEF ON BEHALF OF AMICI CURIAE

Mexican American Legal Defense and Educational Fund

and

Asian Law Caucus

STATEMENT

A. The Issue Presented Here.

Amici curiae adopt the Statement of the Case presented in Appellant's Brief. We add to that Statement only a few points pertinent to our own perspective.

In upholding the validity of New York Executive Law § 215(3), which requires that members of the state police force be United States citizens, the District Court applied an equal protection standard less stringent than "strict scrutiny". In determining the proper test to be applied in this case, the District Court reviewed this Court's decisions in Graham v. Richardson, 403 U.S. 365 (1971), and four recent cases involving governmental limitations on employment rights of aliens: Sugarman v. Dougall, 413 U.S. 634 (1973); In Re Griffiths, 413 U.S. 717 (1973); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) and Examining Board v. Flores de Otero, 49 L.Ed. 2d 65 (1976), and correctly determined that this Court has applied strict scrutiny to classifications based on alienage. 419 F. Supp. at 894. However, the District Court then focused upon dictum in Sugarman, supra, which suggested recognition of a state's interest in defining its political community and limiting participation in state government to those who are within that political community. The District Court read this dictum as establishing an exception to the application of strict scrutiny where "the state is dealing with democratic government and its

participants." Id. at 895. Thereupon the District Court avoided following the precedent of this Court's four alien employment cases by declaring the position of state trooper to be such an important part of state government as to fall within the "democratic government" exception delineated in Sugarman. Id. at 895. The court below found the duties of the state police to be "awesome responsibilities" justifying departure from previous alien employment decisions, id. at 896.

The issue presented here is thus whether the position of state police officer is so sensitive and so directly involved in state government as to remove it from the categories of common occupations in the community, to which aliens are guaranteed access by the equal protection clause of the Fourteenth Amendment. Determination of this issue will involve consideration of both the proper equal protection standard to be applied, and the nature of state police positions. In making these determinations, this Court should be conscious of the magnitude of the impact of the exclusionary policy exemplified by the New York statute.

B. The Issue Presented Has Far-Reaching Consequences for Citizens and Non-Citizens Alike.

1. The United States Has a Tradition of Welcoming Immigrants And a Policy of Providing Employment Opportunities to Them.

The United States has always been a nation of immigrants and still remains so. As stated by this Court in In Re Griffiths, supra, 413 U.S. at 717, "[F]rom its inception, our Nation welcomed and drew strength from the immigration of aliens." It holds the promise of opportunity and justice to the poor, the persecuted and the adventurous of all nations. Consistent with this promise has been protection of the alien's right to work in the common occupations of the community as guaranteed by the equal protection clause of the Fourteenth Amendment. See Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886). This basic freedom not only continues to be protected but has been expanded in recent years to restrict the powers of the states to discriminate with respect to employment opportunities against non-citizens. See, Sugarman v. Dougall, supra, In Re Griffiths, supra, and Examining Board v. Flores de Otero, supra. The issue presented here should be decided consistent with this country's long tradition of offering immigrants the opportunity to live and work in the communities of the nation free

from discrimination by the laws to which they too are equally subject.

2. Large Numbers of Permanent Resident Aliens Are Precluded From Employment By Exclusionary Statutes.

Amici curiae submit this brief in order to call this Court's attention to the importance of the issue involved in this case and the impact of its decision on United States alien residents, particularly those of Mexican and Asian descent, and on the provision of effective law enforcement to language minority communities. The latest available U.S. Immigration and Naturalization Service figures show that there were 4,225,725 permanent resident aliens living in the United States in 1975.[1] Of that number 868,198—the largest single group—were from Mexico; 459,393 were from China, Japan, Korea, or the Phillipines.[2] Amicus MALDEF's interest in the impact of this case on Mexican resident aliens is highlighted

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1. U.S. Department of Justice, 1975 Annual Report: Immigration and Naturalization Service, Table 35: "Aliens Who Reported Under the Alien Address Program by Selected Nationalities and State of Residence", p. 112. Washington: U.S. Gov. Printing Off. (1975) [hereinafter cited as "1975 INS Annual Report"]

2. Id.

by the fact that although 1,138,349 persons were naturalized between 1966 and 1975, only 57,866 were from Mexico.[3] Thus, while Mexicans constituted 20.5% of the permanent resident alien population of the United States in 1975, they comprised only 5% of the persons naturalized over the previous nine years. Possible reasons for such an apparent lag in the naturalization rate of Mexican aliens include past and present discrimination, isolation of Mexican and Mexican American communities, and their exclusion from the mainstream of American life. The fact remains, however, that there are a large number of Mexican aliens lawfully residing in the United States and they apparently have a low naturalization rate.

3. Citizenship is Presently Required by the Vast Majority of Law Enforcement Agencies.

Citizenship requirements are prevalent among state and local police departments. In a survey conducted in 1973 by the International Association of Chiefs of Police in conjunction with the Police Foundation, 94% of the state and local police departments surveyed required

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3. Id., Table 39, "Persons By County or Region of Former Allegiance Years Ended June 30, 1966-1976", p. 117.

U.S. citizenship for male sworn personnel.[4] Our research reveals that 24 states presently have statutes that require U.S. citizenship for members of the state police.[5] All nine of the states in which more than 100,000 aliens reside have citizenship requirements for police officers.[6] To these states must be added those

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4. Eisenberg, et al., Police Personnel Practices in State and Local Governments, International Ass'n. of Chiefs of Police and Police Foundation, Washington, D.C. (1973), p. 22.

5. The following statutes require U.S. citizenship for state police positions: Ariz. Rev. Stat. Ann. § 38-201 (but see Atty. Gen. Opinion 73-19 holding this section invalid); Cal. Gov. Code § 1031(a) (but see Chavez-Salido v. Cabell, 427 F. Supp. 158 [C.D. Cal. 1977]); Fla. Stat. Ann. § 943.13(2); Ga. Code Ann. § 92A-214; Ill. Rev. Stat. Ch. 121 § 307.9; Iowa Code Ann. § 30.15; Kan. Stat. Ann. § 74-2113; Ky. Rev. Stat. Ann. § 16.040(2)(c); Mass. Gen. Laws Ch. 31 § 12; Mich. Stat. Ann. § 28.4; Miss. Code. Ann. § 45-3-9; Mo. Rev. Stat. § 43.060; Mont. Rev. Codes Ann. § 31-105(3)(a)(v); Nev. Rev. Stat. § 281.060(i); N.H. Rev. Stat. Ann. § 106-B:20; N.J. Rev. Stat. 53:1-9; N.M. Stat. Ann. § 39-2-6; N.Y. Exec. Law § 215(3); N.D. Cent. Code § 39-03-04(4); Or. Rev. Stat. § 181-260 (1)(a); Pa. Stat. Ann. Tit. 71 § 1193; R.I. Gen. Laws Ann. § 42-28-10; Tex. Rev. Civ. Stat. Ann. Art. 4413(9)(2); Utah Code Ann. § 27-11-11. In addition Indiana requires citizenship by regulations: Ind. Adm. Rules and Regs. (10-1-1-4)-7.

6. 1975 INS Annual Report, p. 112. The following figures were taken from Table 35, supra n. 1 (see next p.)

municipalities and other local governments, probably innumerable, which similarly restrict or bar the employment of aliens as police officers.[7] The number of permanent resident aliens living in these nine states totals 3,272,020. Employment as police officers is foreclosed to this large number of aliens by statutes similar to the one challenged here.

Each of the four Southwestern border states and Illinois, where most Mexican resident aliens settle, excludes non-citizens from serving as police officers.[8] The opportunity

State	Total Aliens	Perm. Resid. Aliens
California	1,129,706	1,058,991
New York	794,508	728,526
Florida	371,114	302,770
Texas	327,668	306,383
New Jersey	269,379	235,249
Illinois	286,581	255,540
Massachussetts	176,955	162,332
Michigan	140,311	126,769
Pennsylvania	107,781	95,460

7. This category would include both local units that independently enforce a state law or practice, see Chavez-Salido v. Cabell, supra, n. 6.; and those that have their own exclusionary ordinances, see Mohamed v. Parks, 352 F. Supp. 578 (D. Mass. 1973).

8. 1975 INS Annual Report, p. 112. The following figures were taken from Table 35, supra, n. 1: (see next page)

to serve as police officers is thus denied to 804,763 Mexican aliens in those states which have the largest Spanish speaking populations which must be served by state and local police departments. The same situation is true for Asians. In California and New York, the two states with the largest Asian alien populations, containing 161,146 and 56,811 aliens of Chinese, Japanese, Korean and Philipino origin respectively,[9] U.S. citizenship is required for state police positions.

4. Law Enforcement Services in Minority Communities Are Adversely Affected By Police Department Citizenship Requirements Which Exclude Aliens of National Origin Minorities.

Amici's concern is not limited to the thousands of prospective police officers who will be affected by this decision. Of equal importance is the impact which exclusionary rules have on the millions of language minority

State	Aliens	Perm. Res. Aliens	Aliens from Mexico
Calif.	1,129,706	1,058,991	459,528
Texas	327,668	306,383	235,808
Ill.	286,581	255,540	60,863
Ariz.	60,143	56,251	37,946
New Mex.	17,291	16,084	10,618

9. Id., p. 112.

citizens and non-citizens, particularly Mexican American and Mexican and Asian, who are served by law enforcement agencies across the country. Increased emphasis has rightly been placed on minority recruitment and on the goal that police agencies should be representative of the population they serve.[10] Employment of minority police officers is seen as a "realistic means for improving the modern police agency's capability to provide an effective range of services."[11] Yet one major source of national origin minorities—permanent resident aliens—is being systematically excluded from consideration.

Language minorities are seriously underrepresented on police forces. Statistics compiled by the Race Relations Information Center in 1974 indicate that only 3.1% of state police officers of the 42 states responding to its survey were members of minority groups.[12] The

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10. See, U.S. Advisory Commission on Criminal Justice Standards and Goals, Police (Washington, D.C. 1973), and California Attorney General's Advisory Commission on Community Police Relations, The Police in the California Community (1973).

11. California Attorney General's Advisory Commission, supra, p. 11-2.

12. Egerton, "A National Survey of Minority Policemen: How Many Are There?", 5 Race Relations Reporter No. 21 (Nov. 1974).

data further indicated that there were only 511 Hispanic officers, comprising only 1.2% of the total of 41,894 sworn personnel.[13] The paucity of Asian state police officers is even more striking: out of those 41,894 sworn personnel referred to above, only 7 were Asians.[14] None of these Asian officers were from New York. Data from several states of large Mexican-American population are representative of the statistics for Mexican Americans. California, where Spanish-surnamed persons make up 12.9%[15] of the state's population, has been unsuccessful in hiring highway patrolmen who reflect the populations which they serve. Spanish/Mexican-American officers comprised only 3.26% of the force in 1974.[16] Texas has a Spanish-surnamed population of 1,195,416, or 14.9% of

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13. Id., p. 19.

14. Id.

15. U.S. Bureau of the Census, 1970 Census of Population: Spanish Ancestry, Washington 1973, Table B. [hereinafter cited as "1970 Census: Spanish Ancestry"]

16. International Association of Chiefs of Police, Comparative Data Report 1974, p. 218. [hereinafter cited as "IACP Comparative Data Report"]

the total population of the state.[17] In addition, the state receives hundreds of thousands of Mexican tourists annually.[18] Yet, the Texas Highway Patrol reported in 1974 that only 3.95% of its officers were Spanish/Mexican-American.[19] Illinois had no Spanish/Mexican-American state police officers, nor were there likely to be any by 1976.[20] In addition to having large Mexican-American populations, each of these states has a large Mexican alien population. These states, and others, have foreclosed a potential source of Spanish-speaking police personnel by denying employment opportunities to permanent resident aliens. This disproportionately low number of Mexican-American and Spanish speaking state police contributed to the continued neglect of communities which have traditionally been underserved. Such data tend to serve to confirm minority group perceptions that the service they receive is of poorer quality than that provided to the majority community.[21]

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17. 1970 Census: Spanish Ancestry, Table B.

18. Of a total of 1,586,999 temporary visitors from Mexico admitted at land border ports, 644,482 entered through Texas. 1975 INS Annual Report, p. 181.

19. IACP Comparative Data Report, p. 218.

20. Id., p. 218

21. Cal. Att'y. Gen. Adv. Comm., supra n. 10, p 11-4.

The United States Commission on Civil Rights issued a report in 1970 which found evidence that Mexican-Americans in the Southwest were victims of widespread discrimination by law enforcement officials.[22] The double standard of treatment was found to alienate Mexican Americans from police officials. Although language difficulties were found to handicap many Mexican-Americans in their contacts with law enforcement officials, the Commission found that few agencies had made any effort to provide instructions in conversational Spanish to their officers.[23] Employment of Mexican-Americans by law enforcement agencies was found not to reflect the population of the areas served and this failure to maintain a representative staff was cited as a factor in poor police-community relations and problems in law enforcement.[24] Officers from minority communities bring to law enforcement agencies knowledge of their neighborhoods, their culture, and their language which white Anglo officers may have difficulty understanding. A higher minority representation on police forces seems to be the logical

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22. U.S. Commission on Civil Rights, Mexican-Americans and the Administration of Justice in the Southwest: Summary, Washington 1970, p. 2.

23. Id., p. 12.

24. Id., p. 17.

solution to strained relations between minority communities and the police.[25] In fact, a public opinion poll conducted in California indicated that only 22% of the people surveyed believe that enough minority group officers are assigned to minority neighborhoods.[26] The problems posed by differential police treatment of Mexican-Americans, whether real or perceived, can be alleviated by recruiting qualified persons from an as yet untapped source—the large population of permanent resident aliens of Mexican origin.

The ramifications of this case apply equally to Asians. The Asian population is growing rapidly each year, being bolstered by a large influx of immigrants. Between the years of 1970 and 1973, 390,477 Asians immigrated to the United States.[27] A substantial proportion of the Asian population is non-English speaking or of limited English-speaking ability. The problems faced by these immigrants

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25. Id., p. 13.

26. Cal. Att'y. Gen. Adv. Comm., supra n. 10, p. 11-4.

27. U.S. Dept. of Health, Education, and Welfare, Office of Special Concerns, Office of Asian-American Affairs, "A Summary of Asian American Health, Education and Welfare Problems", Tables A,B.

and other language minorities has become universally recognized over the past decade. See, e.g., Lau v. Nichols, 414 U.S. 563 (1973).

Problems in police relations with Asian communities have intensified in metropolital areas where there have been a significant influx of immigrants. See Chan v. Scott, C.A. No. C-72-2049 CBR (N.D. Cal. 1972), and Wong v. Younger, C.A. No. C-73-2050 LHB (N.D. Cal. 1973). No doubt such strained relations can be mitigated by an increase in Asian representation in police departments, especially of those Asians who are bilingual and bicultural. A large potential pool of qualified Asian aliens to fill these needs remains untapped.

ARGUMENT

I. THIS CASE IS CONTROLLED BY PRIOR DECISIONS REQUIRING INVALIDATION OF NEW YORK'S EXCLUSIONARY STATUTE.

A. The Issue Framed for This Case by Prior Decisions of This Court.

In recent years this Court has handed down a quartet of harmonious decisions in cases involving official restrictions on alien employment rights. Sugarman v. Dougall, 413 U.S. 634 (1973); In Re Griffiths, 413 U.S. 717 (1973); Examining Board v. Flores de Otero, 49 L.Ed.2d 65 (1976); Hampton v. Mow Sun Wong, 48 L.Ed.2d 495 (1976). The principles established by those decisions clearly frame the issue presented here. Those decisions struck down restrictions on alien employment in a number of positions—the state competitive civil service generally (Sugarman), the federal competitive civil service generally (Hampton), lawyers (In Re Griffiths), and civil engineers (Flores de Otero). Consistent lower court decisions that followed or correctly anticipated this Court's rulings have applied the same reasoning to invalidate similar restrictions affecting a wide variety of positions.[28]

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28. See, e.g., Satoskar v. Indiana Real Estate

To trace here the reasoning of this Court in its recent decisions would be superfluous. We simply note three broad principles defini-

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Commission, __F. Supp. __ (S.D. Ind. 1973), aff'd. 417 U.S. 983 (1974) (real estate salespersons); Mendoza v. City of Miami, 483 F.2d 430 (5th Cir. 1973) (municipal civil service positions generally); Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977) (three-judge court) (police officers); Taggart v. Mandel, 391 F. Supp. 732 (D. Md. 1975) (three-judge court(notaries public); Surmeli v. State of New York, 412 F. Supp. 394 (S.D. N.Y. 1976) (physicians); Younus v Shabat, 336 F. Supp. 1137 (N.D. Ill. 1971) (college teachers seeking tenure); Norwick v. Nyquist, 417 F. Supp. 913 (S.D. N.Y. 1976) (public school teachers); C.D.R. Enterprises, Ltd. v. Board of Education, 412 F. Supp. 1164 (E.D. N.Y. 1976) (three-judge court), aff'd. 50 L.Ed.2d 742 (1977) (public contractors' employees); Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), aff'd 413 U.S. 902 (1973) (state civil service jobs generally); Teitscheid v. Leopold, 342 F. Supp. 299 (D. Vt. 1972) (state employment generally); Mohamed v. Parks, 352 F. Supp. 518 (D. Mass. 1973) (municipal employment generally); Wong v. Hohnstrom, 405 F. Supp. 727 (D. Minn. 1975) (pharmacists); Ramos v. United States Civil Service Commission, 376 F. Supp. 361 (D. P.R. 1974) (federal employment generally and federal farm disaster loan eligibility). Cf. Maudet v. Nyquist, 406 F. Supp. 1223 (W.D. N.Y. 1976) (three-judge court) (student financial aid applicants); Lopez v. Butz, 535 F.2d 1170 (9th Cir. 1976) (farm operating loan eligibility); Soni v. Board of Trustees of Univ. of Tennessee, 513 F.2d 347, 350 n. 1 (6th Cir. 1975) (university educators). See also, Purdy v. Fitzpatrick, 456 P.2d 645 (Cal. 1969) (public works jobs).

tively established by those decisions. First, restrictions on the right of permanent resident aliens to seek employment with or controlled by government must be searchingly reviewed under the equal protection standard of strict scrutiny. Sugarman, supra, 413 U.S. at 642; In Re Griffiths, supra, 413 U.S. at 721; Flores de Otero, supra, 49 L.Ed.2d at 85. These decisions merely apply the long-established principle that aliens are a discrete and insular minority and are particularly the subject of Congressional control, such that state laws separately classifying or restricting them must satisfy a heightened standard of constitutional review, Truax v. Raich, 239 U.S. 410 (1948); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Graham v. Richardson, 403 U.S. 365 (1971).[29] Second, statutes or rules which indiscriminately exclude aliens from broad classes of public employment are constitutionally defec-

29. The District Court held the strict scrutiny test inapplicable, because of the purportedly policy-making nature of police jobs. 419 F. Supp. at 895. It noted, however, that even under that test it was satisfied that the State had borne its burden. Amici do not argue the question of appropriate standards here, for we believe the District Court's error to be a clear one, and in any event one thoroughly discussed in Judge Mansfield's dissenting opinion.

tive, Sugarman, supra, 413 U.S. at 642-3; Flores de Otero, supra, 49 L.Ed.2d at 87, cf. Hampton, supra, 48 L.Ed.2d at 515-6. Third, the only positions for which laws restricting alien employment might be entitled to the usual measure of federal judicial deference to state legislative choices, under a less strict standard of equal protection review, are those within "an appropriately defined class of positions...[consisting of] state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government", Sugarman, supra, 413 U.S. at 647. This dictum derives from the Court's brief statement recognizing a state's power "to preserve the basic conception of a political community" by limiting the franchise to its residents, in Dunn v. Blumstein, 405 U.S. 330(1972). Similarly, this Court has struck down a prohibition on aliens' licensing to practice law by noting that an attorney did not occupy a position "so close to the core of the political process as to make him a formulator of government policy", In Re Griffiths, supra, 413 U.S. at 729.

Simply stated, the issue in this case, therefore, is whether state police officers "perform jobs that go to the heart of representative government" because they "participate directly in the formulation, execution, or review of broad public policy". The District Court, relying very heavily on the "political community" notion of Dunn, held that they do, 419 F. Supp. at 895. Only on that basis could it escape the Sugarman holding and the controlling principles of the line of cases to which Sugarman belongs. Amici urge that this strained holding was patently in error, for reasons Judge Mansfield's dissenting opinion below points out. Neither the record in this case nor our common knowledge of what police officers do will countenance the District Court's conclusions.

B. State Police Jobs Are Not So Different In Pertinent Respects As To Require a Result Different From That Of Prior Decisions.

State trooper jobs are not policy-making or political in nature. While troopers and other police officers enforce the law, it is most emphatically not their job to make law (the legislature's task), to formulate policy to implement the law (the executive's task), or

to construe the law (the judiciary's province). The discretion exercised by police officers is not one of policy-making choices; it involves the determination of whether the facts in a particular instance require application of prescribed rules which the officer is obligated to enforce and obey.

The nature of a New York state trooper's usual activities is suggested by the fact that the state police force in 1974 issued 514,000 traffic tickets and made only about one-tenth that many arrests, including the presumably substantial number of arrests made for motorist offenses such as drunk driving (Connelie Aff. ¶ 8, App. D-28). The state police job is not elevated to a position central to representative government. The State seeks to transfrom the nature of police work by stating that police officers perform a governmental function (but so do file clerks in state offices); that they execute "broad public policy" (but so does a state contracts review officer or a housing inspector); and that they carry out a sovereign function (but so does an income tax form aduitor). Notwithstanding these protestations, there is nothing unique about the duties of a police officer for New York State that differentiates his job from thousands of others in

government, in the perspective of the Sugarman dictum. The District Court's apparent view that in selecting state troopers New York "is dealing with democratic government and its participants", 419 F. Supp. at 895, is highly exaggerated. Therefore, nothing warrants an exception to the widely-applied Sugarman rule for the particular position involved here.

This conclusion follows from the analysis of other jobs in other cases. This Court has previously held that attorneys' responsibilities as officers of the Court "hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens", In Re Griffiths, supra, 413 U.S. at 724. District courts have invalidated state-mandated citizenship requirements for notary public positions, even while recognizing them as "important and essential" state constitutional offices, Taggart v. Mandel, supra, n. 28; for peace officer positions (including state highway patrol) which were explicity found not to be a "high policy making office", Chavez-Salido v. Cabell, supra, n. 28; and for public school teachers with recognized responsibility to impart national values, Norwick v. Nyquist, supra, n. 28. It would be incongruous to hold that aliens may not constitutionally be prevented

from holding such responsible public positions as those of lawyer, notary, and teacher, but may be barred from serving as state troopers.

The New York statute here challenged should be subjected to rigorous scrutiny and held invalid under the equal protection clause, on the grounds that state police jobs are not qualitatively different in pertinent respects from those opened to aliens by prior decisions.

II. THE NEW YORK STATUTE VIOLATES PERMANENT RESIDENT ALIENS' RIGHT TO EQUAL PROTECTION.

Even if the Court chooses to examine afresh the New York statute and the state police positions it forecloses to aliens, the result must be the same. The State cannot justify its exclusion of permanent resident aliens by any of the reasons relied on below, nor by any of the arguments the State has made in this or similar cases.

New York State points to no credible evidence in support of its claims about the nature of state police work. The Connelie affidavit is purely conclusory, and contains little information about what state police officers do. Similarly, the State's assertions regarding the deficiencies of aliens lie purely in the realm of speculation. There is no basis in the record

to conclude that aliens generally lack any of the legitimate qualifications for state police officers.

New York State's doubts about the loyalty of permanent resident alien police applicants are as improbable as they are hypothetical. Many permanent resident aliens have resided in this country for long years, and are full participants in our society in all major respects save the electoral process.[30] Others, such as Appellant Foley, may have made a complete committment to this country but remain unable to seek citizenship because of inability to meet the five-years' residency period prerequisite to naturalization. Every federal court that has examined the issue, with the exception of the court below, has rejected the suggestion that aliens' allegiance to this country is necessarily questionable.[31] There is no proof in this case or elsewhere that aliens as a class exhibit lack of allegiance. The State merely speculates that aliens may be presumed insufficiently loyal, and the Court below

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30. Cf. Sugarman, supra, 413 U.S. at 645-6, 648-9; Hampton, supra, 48 L.Ed.2d at 502.

31. Younus v. Shabat, supra, n. 28, 336 F. Supp. at 1140; Taggart v. Mandel, supra, n. 28, 391 F. Supp. at 740; Norwick v. Nyquist, supra, n. 28, 417 F. Supp. at 921-22.

adopted the suggestion, 419 F. Supp. at 897 [32] The State's prime example of the dangers of the hypothetical loyalty problem is that state police officers occasionally arrest undocumented aliens. There were 200 such apprehensions in 1974, or one per year for each 16 state police officers. Connelie Aff. ¶ 11, App. D-30. Arrests of aliens constituted 0.4% of all arrests made for felonies, misdemeanors, or offenses (not counting the much more numerous traffic offenses). More importantly, the State's argument is unpersuasive because it requires the assumption, nowhere supported by evidence, that alien state police officers would be any less zealous in pursuit of undocumented alien law violators. Just this Term this Court refused to make a similar assumption in Castaneda v. Partida, 51 L.Ed.2d 498 (1977). There, the Court eschewed the suggestion that the behavior of a minority group official toward others of his own group would be predictably or presumptively favor-

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32. The Court offered no facts to support its conclusions, but only broad and unwarranted assumptions. It approved the state's doubt that aliens would be sufficiently concerned with the state's "self-preservation", would "apply justly the laws of the state and federal government", and would lack the proper "spirit and enthusiasm for the customs and traditions of American life", 419 F. Supp. at 897. The Court found in

able.[33] The State's analogous suggestion here is even more implausible, since even in the hypothetical case of an alien improperly swayed by sympathy for his countrymen, most aliens will be of different nationality groups. We should not presume that an Irish immigrant would refuse to arrest or report, for example, an illegally disembarked Korean seaman.

The other rationales advanced by the State in support of the New York statute's constitutionality are equally meritless. The statute is not valid simply because it has remained on the books for some 60 years. "[N]o one acquires a vested right in violation of the Constitution by long use...", Walz v. Tax Commission, 397 U.S. 664, 678 (1970); see also Hampton v. Mow Sun Wong, supra, and Taggart v. Mandel, supra, 391 F. Supp. at 740. The widespread adoption of similar rules, see opinion

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these unsupported speculations a "compelling interest" to bar all aliens.

33. Mr. Justice Marshall, concurring, wrote:

> ...this Court has a solemn responsibility to avoid basing its decisions on broad generalizations concerning minority groups. If history has taught us anything, it is the danger of relying on such stereotypes.

51 L.Ed.2d at 516.

below, 419 F. Supp. at 897 nn. 13,14, is equally irrelevant to the constitution issue, Taggart v. Mandel, supra.[34] And while knowledge of and familiarity with the language and customs of our country might well be a legitimate concern of the State, nothing in the exclusion of aliens is directed at that specific factor, which would obviously be a difficulty for some aliens but inapplicable to many others.[35] Therefore, a more specific inquiry must replace the flat ban on aliens. Taggart v. Mandel, supra, 391 F. Supp. at 740.

The New York statute is also unconstitutionally overbroad, since it excludes all aliens from all state police jobs without differentiating those fit for some or all positions from those who are unfit. In this aspect, the statute suffers from the same defect as the New York provision invalidated in Sugarman. The statute fails to distinguish

34. As to other state laws, their commonness is merely a reflection of a widespread preference which, if unconstitutional, cannot prevail. As to foreign states' laws, our American law and tradition are considerably different, to our national credit and benefit, see p.4 , supra.

35. The state already tests the language skills and knowledge of the laws of all applicants. Only those who achieve satisfactory ratings are considered further.

between positions held by high-level state police officials who might make policy and their subordinates in the paramilitary organization who simply carry out orders. It also completely excludes all aliens without regard to individual characteristics which might properly show their aptitude for efficient and faithful service. The broad thrust of the statutory exclusion clearly demonstrates that the statute's purpose and effect are not to distinguish a class of persons capable of performing state police jobs from another class who are not. Rather, the statute excludes all members of a class on the basis of a non-job-related characteristic: their alienage. That statutory scheme constitutes an irrebuttable presumption of the same sort that this Court has repeatedly disapproved in cases involving both discriminatory employment practices, Cleveland Board of Education v. La Fleur, 414 U.S. 632, 644-47 (1974); and equal protection claims, Stanley v. Illinois, 405 U.S. 645, 649-58 (1972), and see other cases there cited.

The overbroadness analysis of Sugarman has been applied to statutes which preclude aliens from employment in a specified position, as well as to those excluding aliens from all employment within a jurisdiction. In Norwick

v. Nyquist, supra n. 28, the court invalidated as overbroad a statute excluding aliens from employment as public school teachers, 417 F. Supp. at 921. By a similar analysis, the Court in Chavez-Salido v. Cabell, supra, n.28, held that a statute excluding aliens from "peace officer" jobs was unconstitutionally broad, 427 F. Supp. at 170.

The District Court sought to evade the conclusion required by the overbreadth analysis by finding that it would be impossible to identify which aliens would be of questionable loyalty due to their continuing commitment to another sovereign, 419 F. Supp. at 899. This finding is sheer speculation, and defies logic as well. The state has never attempted to differentiate loyal aliens from disloyal aliens. There is no reason to believe that reaching such a judgment would be any harder than making similar evaluations of citizens—a process the State already carries out for hundreds of applicants annually, under the regular applicant screening process. The State has always found its present screening procedures adequate for this purpose and there is no reason to think that the inclusion of some non-citizens in the screening process would necessitate different or additional tests. This Court must

reject the District Court's conclusion that the New York statutory scheme is as precisely drawn as the State interest requires.[36]

There are more reasonable and less discriminatory ways to preserve New York's legitimate interest in maintaining a loyal and efficient police force. These alternatives are preferable because they would lessen the discriminatory impact of the screening process on aliens while emphasizing those qualities which are relevant and necessary to performance of the duties of a state trooper. One alternative would be an appropriately narrow statute. There may be positions within the State Police force which are so central to the functioning of government as to be within the exception noted in Sugarman. The court in Chavez-Salido v. Cabell, supra, specifically stated that its decision should not be read as holding that the state could not require citizenship for the most important peace officers, 427 F. Supp. at 171 n. 24.

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36. Indeed, we do not understand what the "state interest requires" to be the correct test. A statute restricting the equal protection rights of a protected class should be an narrowly drawn as possible. See, e.g., Examining Board v. Flores de Otero, supra, 49 L. Ed.2d at 87-88.

Thus, the state can constitutionally protect its interests by enacting a narrowly drawn statute requiring citizenship for those highly sensitive, decision-making police positions which are properly within the Sugarman exception. As an example, New York might look to a Maine statute, which requires U.S. citizenship for state employees "holding technical or professional positions involving formulation, execution or review of broad public policy..."5 M.R.S.A. § 556. (The statute further provides for waiver of this requirement under certain circumstances.) Such a statute, narrowly drawn to limit its discriminatory effect, would certainly provide an alternative means of insuring effective law enforcement.

Another obvious and appropriate alternative is individualized screening of applicants who pass the qualifying examination with a high rank. Such screening of citizen applicants has long been the rule. To extend the screening process to those alien applicants who also score in the range qualifying them for possible appointment would add little to the State's burden and would in effect remove the class-based presumptions against all aliens from the selection process. At the same time, it would enable the State to ob-

tain the benefits of the services of those aliens who would make good troopers, while removing from consideration those who would not. Although we believe that individual evaluations are the most effective as well as the fairest procedure, another alternative is available. Since the State's concerns with aliens center on questions about their loyalty or allegiance, it could continue to rely on a loyalty oath to all would-be state troopers. It is illogical to assume, as did the Court below, that permanent resident aliens who swear their allegiance to this country's laws and principles would be less trustworthy in enforcing them than would citizens who give no oath. Aliens may be required to serve in our armed forces; their taking of a loyalty oath is deemed sufficient to allow them to serve and fight for the United States. The same oath would suffice here. Taggart v. Mandel, supra, n. 28, 391 F. Supp. at 740; cf. In Re Griffiths, supra, 413 U.S. at 725-26 and n. 18 (attorneys' professional standards of practice, enforced by disciplinary rules and official reviews of conduct, obviate need for citizenship requirement to assure proper discharge of lawyers' responsiblity).

CONCLUSION

New York Executive Law § 215(3) discriminates against permanent resident aliens in violation of their right to equal protection of the laws. It cannot be justified under controlling constitutional standards. Its enforcement should therefore be enjoined.

This Court should reverse the judgment of the three-judge court below.

Respectfully submitted,

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